No. 11018

United States Circuit Court of Appeals

For the Ninth Circuit

FERNAND CHEVILLARD and GEORGE PATRON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Opening Brief for Appellants Fernand Chevillard and George Patron

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LEO R. FRIEDMAN,
935 Russ Building,
San Francisco 4, California,
Attorney for Appellants.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Subject Index

Table of Authorities Cited

STATUTES

TEXTS

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The Grand Jurors for the Southern Division of the United States District Court for the Northern District of California returned at the November, 1944, Term, an indictment in three counts against these appellants and five other persons. The first and second counts purport to be based on Section 80 of Title 18 U.S.C.A., while the third alleges that the defendants conspired together and with divers persons unknown "to defraud the United States in

violation of Title 18 U.S.C.A., Section 80,"* and pleads certain overt acts alleged to have been done in furtherance of the conspiracy. Acquitted on the first, but convicted on the second and third counts, each of these appellants was sentenced to be imprisoned for two years in a federal penitentiary on each count, the sentences in each case to run consecutively. (T. R., pages 33-36.) From the said judgments, Chevillard and Patron have each duly appealed to this court, presenting their appeals, pursuant to stipulation with the government, on a single transcript. The record of the trial in the court below is contained in a duly settled bill of exceptions.

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*The statute reads as follows: "**Presenting false claims; aiding in obtaining payment thereof.**—Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any manner within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

JURISDICTIONAL STATEMENT

(1) Jurisdiction of the District Court.

U.S.C.A., Title 28, Section 41, Subdivision 2, which provides that the District Courts shall have original jurisdiction of "all crimes and offenses cognizable under the laws of the United States." Also, the Constitution of the United States, Amendment VI:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

(2) The Jurisdiction of this Court upon Appeal to Review the Judgment in Question.

U.S.C.A., Title 28, Section 225:

> "The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions,—
>
> "First, in the District Court, in all cases save where a direct review of the decision may be had in the Supreme Court, under section 345 of this Title."

(3) The pleadings necessary to show the existence of jurisdiction:

(a) The Indictment. (Tr. p. 2.)

(4) The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question:

These facts are set forth in the introductory sentences to this Brief and will be stated more fully in the ensuing abstract of the case. Accordingly, in the interest of brevity and to avoid repetition, statement thereof is here omitted.

STATEMENT OF THE CASE, PRESENTING SUCCINCTLY THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED

The indictment (Tr. pp. 2-8), omitting the caption and the signatures of counsel, reads as follows:

"First Count

"(Title 18 U.S.C.A. Section 80):

"In the November, 1944, Term of said Division of said District Court, the Grand Jurors upon their oaths present:

"That Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. DeAngury, and Angelo Italo Vincenzini, whose full and true names, and the full and true name of each of whom, except as herein mentioned, are otherwise unknown to this grand jury (hereinafter called said defendants), on the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made a false and fraudulent statement and representation in a matter within the jurisdiction of the War Shipping Administration, a department and agency of the United States of America, relating to a material fact, to-wit, the receipt of certain meat ordered by and for the use of the said War Shipping Administration, which said statement and representation was false and fraudulent as follows:

"That the said defendants, well knowing at all times herein mentioned that the said War Shipping Administration had issued its orders to the Ed

Heuck Company of San Francisco, California, (a limited partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; hereinafter referred to as the Ed Heuck Company) for certain meat to be delivered to the said War Shipping Administration, falsely stated and represented to the said War Shipping Administration that approximately 64,793 pounds of meat had been delivered by the said Ed Heuck Company to the said War Shipping Administration and had been received by the said War Shipping Administration, when in truth and in fact, as the said defendants and each of them then and there well knew, only approximately 46,961 pounds of meat had been delivered by the said Ed Heuck Company for the use of the said War Shipping Administration.

"Second Count

"(Title 18 U.S.C.A. Section 80):

"And the said Grand Jurors upon their oaths do further present that the said defendants Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini, on the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully, and feloniously cover up and conceal by a trick, scheme, and device a material fact within the jurisdiction of the War Shipping Administration, a department and agency of the United States of America, the material facts so covered up and concealed by a trick, scheme and device being as follows:

"That the said defendants, well knowing at all times herein mentioned that the said War Shipping Administration had ordered from the Ed Heuck Company of San Francisco (a limited partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; and A. Pasquini, limited partner; hereafter referred to as the Ed Heuck Company) approximately 64,793 pounds of meat, to be delivered by the said Ed Heuck Company to the said War Shipping Administration, diverted and withheld from said shipment approximately 17,832 pounds of said meat with the intent and for the purpose of converting the same to their own use, and with intent to defraud the said War Shipping Administration covered up and concealed said material fact of said diversion and conversion by the said defendants of said approximate amount of 17,832 pounds of meat by the trick, scheme, and device of signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration, a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

"Third Count

"(Title 18 U.S.C.A. Section 88):

"And the said Grand Jurors upon their oaths do further present that the said defendants, Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini, on or about the 16th day of January, 1945, in the City and County of San Francisco, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did, in violation of Title 18 U.S.C.A. Section 88, unlaw-

fully, wilfully, knowingly, and feloniously conspire, combine, confederate, and agree together, and with divers persons whose names are to the Grand Jurors unknown, to commit offenses against the United States to wit, to defraud the United States in violation of Title 18 U.S.C.A. Section 80 in the manner following, to-wit:

"That the said defendants at all times herein mentioned, knowing that the War Shipping Administration, a department and agency of the United States, had placed a purchase order with the Ed Heuck Company of San Francisco, California, (a limited partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; hereinafter referred to as the Ed Heuck Company) for approximately 64,793 pounds of meat for delivery to the said War Shipping Administration and for its use, conspired, confederated, and agreed together to cause the said Ed Heuck Company to present a claim, false in part, to the said War Shipping Administration for payment from said War Shipping Administration for a total amount of approximately 64,793 pounds of meat, when in truth and in fact, as the said defendants and each of them then and there well knew, approximately only 46,961 pounds of meat would actually be delivered to the said War Shipping Administration by the said Ed Heuck Company; and by the said defendants making and causing to be made false statements and representations in a matter within the jurisdiction of the said War Shipping Administration, to wit, that approximately 64,793 pounds of meat had been received by the said War Shipping Administration from the said Ed Heuck Company, when in truth and in fact, as the said defendants and

each of them then and there well knew, approximately only 46,961 pounds of meat had actually been delivered to and received by the said War Shipping Administration; and by the said defendants covering up and concealing by trick, scheme, and device a material fact relating to a matter within the jurisdiction of said War Shipping Administration, to wit, said material fact being that the said defendants had diverted to their own use and personal gain approximately 17,832 pounds of meat from a shipment consisting of approximately 64,793 pounds of meat purchased by and intended for the use of said War Shipping Administration from the said Ed Heuck Company, and covered up and concealed said material fact by the trick, scheme, and device of signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration, a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

"That during the existence of said conspiracy and in furtherance of the same, and to effect the objects thereof, in said Division and District and within the jurisdiction of this Court, one or more of said defendants, as hereinafter mentioned by name, did the following overt acts, to wit:

"1. That on or about the 16th day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Julio Rodriguez and Pierre Francois Barral met and held a conversation with one Elroy Hinman;

"2. That on or about the 18th day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Pierre Francois Barral, George Patron, Fernand Chevillard, and Lucien L. De Angury met and held a conversation;

"3. That on or about the 22nd day of January, 1945, the said defendant Fernand Chevillard telephoned from the City and County of San Francisco, State of California, to the said defendant Angelo Italo Vincenzini at the City of South San Francisco, State of California;

"4. That on or about the 23rd day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Lucien L. De Angury and Pierre Francois Barral drove a truck loaded with approximately 17,832 pounds of meat from the City and County of San Francisco, State of California, to the City of Millbrae, County of San Mateo, State of California;

"5. That on or about the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, the said defendant Julio Rodriguez signed a receipt from the Ed Heuck Company for 64,793 pounds of meat;

"6. That on or about the 23rd day of January, 1945, in the City of Millbrae, County of San Mateo, State of California, the said defendants Pierre Francois Barral, Fernand Chavillard, George Patron, Clarence Valentine Jacky, and Lucien L. De Angury unloaded from a truck approximately 17,832 pounds of meat and placed the same in cold storage on the premises of the defendant Clarence Valentine Jacky."

The appellants Chevillard and Patron filed a general demurrer to each count of the indictment. (Tr. 12.)

This demurrer was overruled by the District Court on February 10, 1945, and each of the appellants excepted to the ruling. (Tr. p. 76.)

The defendants Chevillard, Patron, Rodriguez, Jacky and Vincenzini each pleaded Not Guilty to each and every count of the indictment.

The defendants Barral and De Angury pleaded Guilty to all counts of the indictment, and thereafter testified as witnesses for the government.

For a clear understanding of the case and for the purpose of showing the manner in which the questions involved on this appeal were raised, we deem it appropriate to set forth a résumé of the evidence.

The defendant Julio Rodriguez was chief steward, and the defendant Pierre Barral was assistant steward, on the S. S. "Sea Perch," which was operated by the United Fruit Company as a troop transport for the War Shipping Administration. All invoices and purchase orders were rendered to the United States of America War Shipping Administration. (Tr. p. 85.)

The Ed Heuck Company was a partnership engaged in the business of selling meat at wholesale.

Elroy Hinman, who was manager of the meat company, testified that an order for meat was received from the War Shipping Administration for the **Sea Perch** in January of 1945. (Tr. 89.) The witness related that on January 16, 1945, he received a visit at his office from Rodriguez and Barral, and had a conversation with them, which the court, over the objection and exception of counsel for the appellants Chevillard and Patron, permitted him to narrate. The point of the objection was, of course, that the conversation was had out of the presence of both Chevillard and Patron, and was not binding upon them. (Exception No. 4; Tr., p. 90.) The witness then proceeded to tell the following story of his dealings with Rodriguez and Barral:

> "The chief steward stated that he had or his company had placed with our company an order for some

36 or 38,000 pounds of beef, that they did not require that much beef on the ship, that there already was more than was reflected by their inventory and that up to 25,000 pounds of that beef might be diverted to some other use, that he was willing to furnish my company,—that he was willing to see that my company received receipts for the delivery of the entire order, but that up to 25,000 pounds of that order should not actually be delivered to the ship, that we were to bill the entire quantity as ordered and dispose of a portion not delivered for our mutual profit. Nothing was said as to what our mutual profit was to be, only that it was to be divided three ways between the chief steward and the assistant steward and myself. I stated that all our deliveries to the ships were for the account of the War Shipping Administration, United States Government, that it would not be practicable to attempt to divert meat consigned to the Government to any other source. The chief steward and assistant steward both assured me that it would be a very simple operation, that our bills would be receipted for as a complete delivery. I stated that we would have no means of disposing of this meat anywhere else because everything we sold was to the Government. The assistant steward explained that he had arrangements or connections whereby he could himself dispose of the meat that was not delivered to the ship. I told him that I would like to think about that a little bit and meet them at some future date. I wanted to talk to my principals about it. When I say 'the chief steward' I mean Mr. Rodriguez. Both of those men then left my office and stated that one or both of them would contact me again.

"Following another telephone call on Wednesday, January 17, 1945, I met the assistant steward at noon at Tadich Grill on Clay Street, right across from our

place of business. He told me that the ship for which this meat was ordered was the Sea Perch, that it would be loading sometime the following week and that he would like to get from me a list of everything that we were to load on that ship. I told him that I would get that for him and deliver it to him when we met another time.

"Following another telephone call on Friday, January 19, 1945, I met the assistant steward at the corner of Montgomery and Sacramento Street. We walked to the Palace Hotel. I gave him a list of the complete meat order for our ship that was placed with our company, sat down in the lobby of the Palace Hotel after picking up some memo paper from the American Trust Company Branch Office there, made a list, and went over the list with the assistant steward. The list prepared at the time showed a certain quantity of beef, W.S.A., meaning War Shipping Administration specification. It did not show what the cuts are or any breakdown of it. The assistant steward told me that only the choice cuts of meat were to be withheld from delivery to the ship and should be loaded in a separate truck. He wanted to know the quantities of each different cut of meat that would make up this order. I went into the telephone booth with the assistant steward, called our office, obtained the percentages of the various cuts of beef according to the War Shipping Administration's specifications and the assistant steward wrote those percentages down on a slip of paper in the booth as I called them off for him from my end of the telephone. (Tr. 91-93.) At the Palace Hotel, after obtaining the percentages of the various cuts, the assistant steward and I sat down and made up a list according to his description of what would make a truck load somewhere under 25,000 pounds. About 19 or 20,000 would

be the limit of any of our trucks. We listed all of the choice cuts of beef according to the list I just identified and some pork items and some veal and lamb. I was directed by the assistant steward that that should be the meat that should be put onto a separate truck that should be withheld from delivery to the ship and the assistant steward explained that day as to how this truck might be delivered. He told me that the truck might go to the dock, the same as our other loads, would be loaded on the ship if there was anything to arouse suspicion, otherwise would be driven away by some truck driver to be furnished by him. He asked if we had a truck driver who might be taken into our confidence for not too large a fee to drive the truck and I told him that we probably could. He suggested that he contact a truck driver employed by our company that I might designate. I told him to call our place of business the next morning at nine o'clock and ask for Frank and I would arrange with Frank that he was to answer that call and would join the assistant steward and the assistant steward would explain to this truck driver direct what he was to do with the truck.

"At nine o'clock on the morning of Saturday, January 20, 1945, a telephone call came. I had instructed our telephone operator that when someone asked for Frank at nine o'clock to place that call on my phone. I asked the assistant steward to meet me at the same place—Montgomery and Sacramento Street—that I wanted to talk with him about the truck driver. I met the assistant steward at eleven o'clock and told him I thought it would be better for us to place this loaded truck on Sansome Street, right adjacent to our plant and just let it sit there and have his own driver come and pick it up. We walked to the place where I showed him the truck would be. On the way I told

him that this was an impossible deal, that it just couldn't be worked. I told him that there no doubt were a dozen people, probably FBI people, following us, that I would show him where the truck would be, but I recommended to him that he leave the truck alone. He assured me everything was all right, that he had all of his plans for the disposing of the meat.

"On Monday, January 22, I had a call from the assistant steward asking me to meet him at Tadich Grill as he wanted to make arrangement about the delivery receipts for the entire order of meat. At noon I met him and I told him that he had better forget the whole deal, that it wouldn't work, but that if he wanted to go ahead the bills were on the seat of the truck, the delivery receipts for the entire order of meat.

"On Tuesday, January 23, 1945, I received another telephone call from the assistant steward, asking me if the truck was sitting out there on Sansome Street. I told him it was. He asked if the delivery receipts were on the seat of the truck and I told him they were. On this truck which was on the corner of Sansome and Merchant Streets there were approximately 17,000 pounds of pork and lamb from the order for the Sea Perch. At 3:40 p.m. on Tuesday, January 23, the assistant steward came in my office, handed me the signed delivery receipt for the entire lot of meat order for the Sea Perch, including that, that was on the truck at that time sitting out on Sansome Street. I saw it there still. The paper you show me is the one handed to me by the assistant steward. There were several copies of it. I put a notation on there showing I received it at 3:40 p.m., January 23, 1945. It is the delivery tag from which we prepare our billing against the War Shipping Administration for delivery to their agents the United Fruit Company for collec-

tion of our charges. It covers all the beef items and all of the other items of meat ordered from us for the Sea Perch except some pork shoulders that were on a separate order and separate delivery receipt. That receipt includes approximately 17,000 pounds still on the truck as testified to by me. The total amount of meat this sheet calls for is approximately 64,793 pounds. I don't know the exact weight." (Tr. 94-96.)

On cross-examination by counsel for these appellants, the witness stated that he did not know whether a bill was sent to the United Fruit Company for the meat, and would have to depend upon his records, and that he did not know whether the Heuck Company delivered to the **Sea Perch** or to the United Fruit Company or the War Shipping Administration an amount of meat equivalent to that which had been left in the truck on Sansome Street. As to those matters he stated that he would have to depend upon the records (Tr. 101), and on the books of the company which were kept under his general supervision. (Tr. 103.)

At this juncture, counsel for Chevillard and Patron requested the court to instruct the witness to produce the books referred to. This request was opposed by the United States Attorney and denied by the Court, counsel for these appellants excepting to the ruling. (Tr. 103-104.)

Dean Heuck, who was a limited partner in the Ed Heuck Company, testified:

"During the month of January, 1945, I supervised an order of meat for delivery to the Steamship Sea Perch. Five trucks were required to handle the entire order, four large ones and one small one. The

small one was loaded at 530 Clay, the four large ones down at Battery, at National Ice. Three large trucks and one small one actually delivered meat to the Steamship Sea Perch. The fourth truck was placed out on Sansome Street, between Merchant and Washington. I recognize Government's Exhibit No. 5 in evidence. It is the receiving bill supposed to be delivered to the Sea Perch. It represents the entire order of meat for the Sea Perch—about 64,000 pounds. As far as I know there was only four trucks of meat delivered to the Sea Perch. The truck not delivered had on it around 17,500 pounds, which is included in this shipping tag and was not delivered. (Tr. 104-105.) . . . I was told to separate these special or certain cuts and load it on this one truck. I did so with the exception of the pork loins and the veal. I am referring to the large International truck that was left on Sansome and Merchant Streets. I recognize those boxes in the courtroom. That is the trimmed tenderloin. It was part of the shipment placed on the truck parked on Sansome Street.

"I was in company with the special agents of the FBI down at the Millbrae Dairy when certain meat was recovered by the FBI. The meat recovered there was the meat that had been placed on this special truck that had been parked at the corner of Sansome and Merchant Streets. These three items—the box, the sack, and the carton of meat—were part of the meat that was recovered in my presence by the agents of the FBI at the Millbrae Dairy on January 23, 1945. The large box contains fabricated lamb. The sack contains oven prepared rib, and the carton contained trimmed tenderloin. These three items are typical of everything that was in that truck." (Tr. 105.)

Cross-examined by Mr. Friedman, the witness testified:

> "I supervised the loading of the fifth truck that never reached the Sea Perch. I did so in a manner to conform with the information that Mr. Hinman gave me as to what should go in that truck. I can identify them by the lot numbers of meat scheduled for that ship. I examined the lot numbers when they were taken out at Millbrae. When Mr. Hinman told me of these special things that were going to this special truck I was told why they were to be segregated from the other portions of the shipment. When I put these things in the special truck I knew that the contents of that truck were never to be delivered to the Sea Perch and I knew that the other four trucks were to be delivered to the Sea Perch. The 17,000 pounds of meat on the special truck was never delivered to the Sea Perch and another 17,000 pounds was never delivered to the Sea Perch to take its place." (Tr. 106.)

The court sustained objections of the United States Attorney to the questions, "Who did you bill for this meat?" and "Was your company ever paid for the meat?" An exception was noted on behalf of all of the defendants. (Tr. 106, 107.)

Melior Brandt-Neilson, who was employed to check ship stores for the United Fruit Company, was checking supplies for the **Sea Perch** at the Army base in Oakland on January 23, 1945, and during the course of the day received three or four truckloads of meat from the Ed Heuck Company. He testified that he had signed a receipt for the same which was presented to him by the defendant Barral. On cross examination the witness admitted that he did not check the stores against the receipts. He fur-

ther related that on the previous day he had a conversation with the defendant Rodriguez on board the **Sea Perch** in the course of which the latter stated that he had saved about 10,000 pounds of beef. He quotes Rodriguez as saying that he had gone to the Heuck Company to talk to the sales manager, stating that if all the meat in the order was supplied, he, Rodriguez, did not know what to do with it, and that the salesman had answered that he could return some meat and that they would be glad to pay him for it. This testimony was admitted in accordance with a ruling by the Court, made upon a prior objection, that conversations, transactions and events which may have occurred between any witness and any one defendant were being admitted as if the other defendant had objected to their materiality and binding effect on them, as if they had noted an exception to it, and subject to a motion to strike without the necessity of making the objections. (Tr. 90.)

The witness on cross examination further testified that he signed the papers presented to him by Barral without checking the meat, explaining this omission in the following language:

> "If I had time to check, I checked before I signed, and if we don't have time to check we sign the delivery tags anyway and check it later. I could not have kept that cargo on the dock until I checked it. I have nothing to do with loading the stores. As a checker, I have no authority to keep cargo on the dock. I can't stop it from being put on the ship. The Army is against keeping the stores on the dock. It wants it all loaded on the ship as fast as possible." (Tr. 112.)

He further stated:

> "There was nothing wrong about the conversation I had with Rodriguez." (Tr. 112.) "He said that the big item aboard these ships that the vessels took was the waste. I know that there was a lot of waste. Rodriguez said that on this last trip that the Sea Perch had just come back from, that he had saved 10,000 pounds of beef. Rodriguez said that the man at Heuck Company had told him, 'If you could return any of the meat, we would be glad to pay you for it.' "

Henry Hamburg, chief checker for the United Fruit Company, testified that the *Sea Perch,* a troop transport, was berthed at the Oakland Naval Supply Depot, Pier 4, on January 23, 1945. The witness said that he had received from the witness Brandt-Neilson five copies of receipted delivery tags from the Ed Heuck Company, which he took aboard. He further testified that one of the tags, marked United States Exhibit No. 9, was signed by Rodriguez, and by himself, and taken to the accounting department of the United Fruit Company.

On cross examination, the witness stated that he satisfied himself that the tag represented the stores that had been delivered on the word of the witness Brandt-Neilson. He did not ask Rodriguez if he had checked the stores to see whether the tags correctly represented the goods received. (Tr. 116.) "Ordinarily," said Hamburg, "when these tags are presented to the chief steward to sign, as a matter of fact the chief steward does not know whether the stores are there or not. He takes my word for it." (Tr. 116.)

Harold Buggeln, chief clerk in charge of accounting for the United Fruit Company, testified that the shipping tag

from the Heuck Company, referred to by the previous witness, probably was delivered to him on January 24. "Upon receipt of the tag it is held for the War Shipping Administration. The tag is used in the preparation of payment for the materials and supplies which the war tag calls for." (Tr. 117.)

Cross-examined by Mr. Friedman, the witness Buggeln testified:

> "The tag is used in support of the invoice. It indicates the receipt of material. Before an invoice can be paid you have to be certain that the material has been delivered, and the only way you have of being certain is from this tag. When I get the invoice I check it against the tag."

Asked by counsel, "Did you check this tag against the invoice?", the witness was not permitted to answer, the court sustaining an objection to the question by the United States Attorney and noting an exception in favor of all the defendants.

Further cross-examined, the witness stated:

> "The United Fruit Company pays my wages and has done so ever since I worked for them. I am not an employee of the War Shipping Administration. This paper was eventually sent to the New York office. It was accompanied by an invoice from the Ed Heuck Company. When I say this paper, I mean one of the duplicates, and an invoice was sent along with it. A copy of that invoice was kept here and is still in my custody. This tag and an accompanying invoice was sent to the New York office for payment. When I sent the duplicate of United States Exhibit No. 9 (the tag previously referred to) on to New York for the payment of the invoice, it called for

payment commensurate with the amount of meat mentioned in this tag. I received from the Ed Heuck Company an invoice calling for payment to them of the 64,000 odd pounds of meat. I do not know whether it was paid. (Tr. 119.)

On re-cross examination by counsel, the witness stated that when he received the shipping tag calling for 64,793 pounds of meat, he knew that some of it had not been delivered but that he did not make any change in the invoice, sending instead a letter of explanation stating that certain of the meat had been recovered, but, as the United Fruit Company had receipted for the full amount, they felt obliged to pay for it.

Neither Hamburg nor the witness Brandt-Neilson was an employee of the United States or of the War Shipping Administration. (Tr. 120.)

Bills for all supplies for the ships operated by the United Fruit Company for the War Shipping Administration were paid by the New York office of the company from a joint account established in accordance with a general agency agreement. (Tr. 120.)

All of the foregoing testimony was deemed objected and excepted to by the appellants Chevillard and Patron, pursuant to the order of the court heretofore referred to.

Pierre Francois Barral, one of the defendants named in the indictment, who, as previously stated, had pleaded Guilty, was called as a witness by the Government. He stated that in September 1944 he had a conversation with Patron and Chevillard at the Normandy Restaurant, which was operated by them. They asked him if he could not get some meat for them, but did not request him to get meat

from the **Sea Perch**, on which the witness was employed as second steward. After that the witness went to sea, returning on December 28, 1944. About two days before the end of the voyage, the witness testified, Rodriguez said he had aboard the ship about 20,000 pounds of meat that nobody knew about, and asked him if there was any way the meat could be sold; and when the witness stated that he did not know, Rodriguez asked, "How about your friend in San Francisco who speaks French?" On the second or third day after the **Sea Perch** arrived at San Francisco, Rodriguez took a trip to New York, returning January 13, 1945. After testifying relative to the conversations which he and Rodriguez had with Hinman, manager of the Heuck Company, concerning which that witness theretofore had testified, Barral stated that on January 13, 1945, he and Rodriguez talked to Patron and Chevillard, apparently at their place of business, and "I told Patron that I might get some meat for them and he said that they were ready to take the meat any time. Then I talked to Chevillard the same as to Patron. Chevillard said he was ready to take the meat any time we were ready." (Tr. 127.) At that time the Ed Heuck Company did not have any order for meat for the **Sea Perch.** (Tr. 128.)

Concerning his further dealings with Hinman, Patron, and Chevillard, the witness testified:

> "I met Mr. Hinman at a lunch place near the meat plant the date following January 16. Hinman said it was time to make arrangement to get the meat, but we did not know how to do it that first day. Mr. Hinman said he would take care of that. After lunch I went back to the ship and told Rodriguez of the conversation

I had with Hinman. Rodriguez said we will see how it is going to work. That night I went to see Patron and Chevillard in the Normandy Restaurant. I said, 'Maybe we had to get the meat. I just saw the manager during the day.' Chevillard and Patron said they were ready to take the meat any time it would be fixed. Mr. Chevillard said the price of the meat would be forty-five or thirty cents a pound—they would pay according to what the meat was. I understand they wouldn't pay forty cents a pound for chuck.

"On the 17th or 18th of January I saw Mr. Hinman. We went I think to the Palace Hotel. Hinman had the order from the company and he showed me the order. I selected some items and told him what meat I wanted from that order. Government's Exhibit 4 was given to me by Mr. Hinman at the Palace Hotel. I wrote on the right hand side of that paper. Mr. Hinman called up the company from a telephone booth and asked them how much meat he was supposed to get and I was marking the order when Mr. Hinman was talking over the phone. I marked down all the better cuts of beef. I had no other talk with Hinman that day. I went back to the ship and told Rodriguez about the talk I had had with Mr. Hinman. Rodriguez did not say anything except that he was satisfied with the deal and how it was working out.

"The next day Hinman was supposed to get in touch with the truck driver for the meat company. I did not see him but I talked with him over the phone. He did not get a truck driver. I talked to him about a truck driver at the lunch place. Hinman told me he would let me know the next day after he talked to the truck driver. The next day he called me and said he couldn't trust the man. He couldn't take a chance with that man. I had to look for a truck

driver myself. Mr. Hinman gave me his home telephone number and I gave it to Rodriguez. After the talk about the truck driver I went to see Patron and Chevillard and told them if they knew somebody who could drive the truck. They said they would look for somebody, but they didn't find nobody. Up to this time I did not say anything to Patron or Chevillard about how much meat I was going to have except from fifteen to twenty thousand pounds.

"I told Chevillard and Patron how I was going to get the meat and about the delivery tags in the Normandy Restaurant on the 18th or 19th of January. I told them that we would get the meat, **'not from the ship but from the meat company**, that we have the meat on the ship, 20 or 25,000 pounds of meat and that we got a truck that would go to their place.' **I told them the meat would be coming from the meat company.** I said the meat was a truck load, instead to go on board the ship it would go to their place, that meat was covered by what was on board, supposed to be left over. They asked me if it was safe. I says, 'The bill will be signed by the ship's steward or the checker.' They said to let them know when we would be ready to deliver the meat. On January 22 I saw Mr. Hinman in the street. He told me that truck would be loaded and be in a certain place waiting for us and that the bill will be right on the seat of the truck. That is all that was said. It was about eleven or ten o'clock in the morning.

"On January 23 I went on board the ship, about nine o'clock in the morning, and there was already some truck already on the pier unloading meat and the checker was there and Mr. Rodriguez was there checking the meat, and there was an Army Lieutenant or soldier checking the meat too. All the trucks were there except that truck was in the street. Rodriguez

and I were waiting for that Army man to get off the pier. Then we can find the bill. Rodriguez and I talked, said that we couldn't do nothing as long as the man was there on the pier. Rodriguez said that. At 11:30 Rodriguez told me to go on the truck and get the bill to be signed. The truck was in San Francisco and the bill was on the seat of the truck. I came over to San Francisco and got the receipt off the truck and went back to Oakland where I gave the bill to the checker, Brandt-Neilsen, who signed the delivery tag. Government's Exhibit No. 5 is the bill from the meat company that I gave to Brandt-Neilson and which we signed. Rodriguez said that the checker will sign the bill or him. If the checker was not there he would sign the bill himself. Rodriguez said that he or the checker would sign the bill but that was already fixed. He didn't mention whether it was fixed with the checker or not. Then I came back to town and went to the office and gave Mr. Hinman the tag, Government's Exhibit No. 5. After I left Mr. Hinman I went up on Broadway looking for a truck driver and found Lucien De Angury. After that I went back to the Normandy and saw George Patron and told him I had a truck driver with me. Patron said, 'Let us go to the place and get the truck and load it.' From the Normandy Restaurant we went to the truck driver's place and the truck driver changed his clothes. Then Patron took us to where the truck was near the meat plant. Patron took us to the truck driver's home and from the truck driver's home to where the truck was. At that time I knew we were going with the truck to Millbrae. I had a diagram or map as how to get to Millbrae. I had one from Chevillard. I recognize the envelope you show me. Chevillard gave that to me on the 22nd. It is a map to go to Millbrae from San Francisco.

"I received a second map showing the route to Millbrae from George Patron. He gave it to me in the garage place on the road where we were repairing the light for the truck. When we got to the truck we couldn't start it, the battery was dead. We finally got the truck started and started for Millbrae. Lucien De Angury was driving the truck and I was sitting with him. About half way between San Francisco and Millbrae we made the first stop. Patron was ahead of us in a car. He came back when he found out we were stuck. The paper you show me is a map from where we were to go to Millbrae. It was given to me by George Patron.

"We had battery trouble on the trip and got a new battery from a garage. George Patron, De Angury and myself were there at the time. After we had the battery fixed we proceeded on to Millbrae. Patron was leading the way. At the Millbrae Dairy we back up the truck to unload the meat. When the truck arrived at the Millbrae Dairy there were present Chevillard and Patron and Mr. Jacky. I had never seen Jacky before. There was also De Angury, George Patron, Chevillard, the truck driver and myself, all unloaded the meat. Jacky only checked the meat. That was about 9 or 10 o'clock at night." (Tr., pp. 129-134.)

On cross-examination by Mr. Friedman, the informer stated that he was born in France, was not a citizen of the United States and had pleaded Guilty. He was asked by counsel, "What was it you pleaded guilty to?" The United States Attorney objected to this question upon the sole ground that "The indictment speaks for itself."

"Mr. Friedman: I am trying to find out what this man thought he pleaded guilty to.

"Mr. Hammack: It is not a question of what he thought; he pleaded guilty.

"The Court: I sustain the objection. I think that is a legal question.

"Mr. Friedman: Exception, Your Honor.

"The Court: Exception noted." (Tr. 134.)

After being thoroughly cross-examined as to the failure to check the shipment of meat at the dock before it was loaded on the **Sea Perch**, and his conversations with Rodriguez and Hinman, the witness testified as follows with reference to his alleged dealings with Chevillard and Patron:

"On December 28 was when I talked to Chevillard or Patron about meat. I saw them both. Chevillard runs the dining room and Patron takes care of the bar. I first talked to Patron behind the bar. I told them we would get some meat for him if he pleased. Patron said, 'You better talk to Chevillard, because he is the one that runs the food business.' Then I saw Chevillard in the dining room. I told him about the meat and we might get some meat, that we didn't know how it would work. There was nothing sure about it, but he said he was willing to take meat at any time. I told him from fifteen to eighteen thousand pounds of meat. The price was not really fixed. It was according to what he would give. According to the quality of the meat. I don't know who said about thirty-five or forty cents a pound. I don't know if I mentioned that or he mentioned it. Chevillard, Patron and I talked about the meat almost every day. One day after talking to Hinman I saw Chevillard and Patron and told them, 'We will get the meat for you.' That was on Saturday, the 13th, the day Rodriguez came back from the East. I told Patron

the chief steward was back from the trip and as soon as we found out how we could get the meat I would let him know. I told Chevillard the same thing. On the night of the day we first saw Mr. Hinman I saw Chevillard and Patron and told them we saw the manager during the day and were talking about how to get the meat. I told whichever one I spoke to that I thought I would be able to get some meat. That is all that was said. On Wednesday in the evening, about nine or ten o'clock, I spoke to Patron first at the Normandy and told him that we were talking to the manager of the meat company and I told him we had 30,000 pounds of meat they had left on board the ship and that nobody knew about it and that **we could get one truck load from the meat company and send that meat to them.** I told Chevillard the same thing. The talk lasted about ten or fifteen minutes with each. There were people in the place. Chevillard was busy running the dining room and Patron was busy behind the bar. On Thursday, between seven and ten o'clock at night I asked Patron if he knows a party who could drive a truck. It was the day Hinman told me he could not get the truck driver from the company. I spoke to Patron about the truck driver and not to Chevillard. Patron told me they had somebody on hand. He said he might have somebody to drive the truck.' Patron told me he couldn't get a truck driver so I had to look for a driver myself. I didn't look until Tuesday, the 23rd, after the bill had been signed by Brandt-Neilson. I found a truck driver in the Hotel Espagnol, in the bar. I knew Mr. De Angury before that. I had just seen him around. He is not a truck driver but I know he could drive a truck,—I supposed so. I did not go into the hotel looking for De Angury. I was looking

for somebody that I knew who could drive a truck. Up to this time I had not had any talk with De Angury. He was drinking at the bar and we left the bar together and went to the Normandy Restaurant. Patron was there. Chevillard was not there. I told Patron I had found a truck driver and that this was the man. When I found De Angury he was drunk. He was having too many drinks. He was pretty close to being drunk. After I found De Angury I was in the Normandy Restaurant about three or four minutes. Then we went to the truck driver's home where we were about five minutes and De Angury changed his clothes. Then Patron took us in his car to where the truck was, where we arrived about four or five in the afternoon. We arrived at the place where the truck was unloaded about eight or nine o'clock. It took us four hours to get to Millbrae as we got stuck with the old truck twice on the road. First the battery went out and we had to get a new battery. Then something went wrong with the light. We were stopped on the road by a policeman who gave us a tag for poor lights. It was a meat company truck and it had the name of the meat company on it. De Angury drove the truck for two or three miles but he didn't know how to drive the truck. The garage man who repaired the battery got in and taught him how to operate the truck. We were following Patron.

"I got the first map from Chevillard on January 22, in the evening. It was the one on the envelope. It was my envelope and Chevillard drew that plan on it. I had that envelope with me on the 23rd. When we were in the garage and they were fixing the light Patron drew a map. I didn't tell him I already had a map.

"When we arrived at the place where the meat was to be unloaded there was Chevillard, Patron, Jacky, the truck driver, and myself. Jacky said where to put the meat. Chevillard, Patron, De Angury and I actually unloaded the meat. I was in the truck handing it out to the people that were on the ground and they carried it away. It took an hour and a half or two hours to unload the truck. The place was lighted inside. There was not much light on the outside. After all the meat was unloaded Chevillard was figuring how many pounds there was there. Chevillard signed a bill with Mr. Jacky and he put my name on it. It was the bill that Mr. Jacky gave to him, the receipt for the meat and Chevillard signed my name. When I came up it was already signed. I said to Chevillard, 'What are you signing my name for?' and he said, 'It don't make no difference.' I did not tell Chevillard to either sign or use my name.

"I never had any talk with Chevillard or Patron as to how they were going to pay me for the meat or when they were to pay me. The only time I ever talked with Chevillard or Patron about being paid for the meat was that they said that they would pay thirty-five or forty cents a pound, depending on the quality of the meat. I knew the price of the meat would be somewhere around four or five thousand dollars. I never had any talk with them when they were going to pay me the four or five thousand dollars or how they were going to pay me." (Tr. 139-143.)

On recross examination, Barral testified that he did not know that there were three charges in the indictment. "I know that I am in court. That is all I know."

"Q. (By Mr. Friedman): You pleaded guilty, but you don't know how many charges you pleaded guilty to—is that right?

A. No, I don't know how many charges.

Q. Do you know how long you could be sent to jail?

Mr. Hammack: I certainly object to that as improper cross-examination, immaterial, irrelevant, and incompetent.

The Court: I will sustain the objection.

"Mr. Friedman: Might I call the Court's attention to this?

The Court: I do not think it is necessary to argue this. You have made your objection and I have ruled on it.

Mr. Friedman: May we have our exception?

The Court: Yes." (Tr. p. 151.)

George M. Kinelle, the chef at a resort known as "The Troc," on Geary Boulevard in San Francisco, testified that on January 16, 1945, he had a conversation with Chevillard, who told him that he knew some people who had meat, and asked if he would purchase any of it. "He told me he had a party who had some meat to sell. As a result of that conversation I went up to the club [the Chef's Club] and talked to some other chefs and then came back on the 23d and left an order for 15,000 pounds of meat." (Tr. p. 154.)

Joseph Mancini, who operated a service station in the 5100 block on Third Street in San Francisco, testified that on January 23, 1945, Patron drove into his place of business and procured a battery for an old truck.

Sarah Hughes, a former employee at the Normandy Restaurant, operated by Patron and Chevillard, testified that on the night of January 23, 1945, the witness Kinelle left a note with her for Chevillard. (Tr. p. 157.)

William J. Hurley, a special agent for the Federal Bureau of Investigation, swore that on January 23, 1945, he saw a truck with the Ed Heuck name on it parked in Key Street to the right of Third Street just before its junction with Bayshore Boulevard. At that time he did not get close enough to the truck to recognize the people in the vehicle. Later, while proceeding south on Third Street, he saw a dark green car which pulled out of Key Street and made a left turn into Third Street to the North. He recognized Patron as the driver. Later the witness followed Patron's car as far as Millbrae, and later the truck came along, followed by an F.B.I. car. He did not actually see the cars go into the Millbrae Dairy. (Tr., 162-164.)

Dallas Johnson, another government agent, testified that he made an inventory of certain meat, recovered from the Millbrae Dairy and, at the time of the trial, in storage in the Army warehouse in San Francisco. The total number of pounds shown by the inventory was 17,832; and the total number of pieces, 321.

Ronald A. Wilson, another special agent of the Federal Bureau of Investigation, testified that he and still another agent, one Fallaw, took a statement from the appellant Chevillard in the early morning hours of January 24, 1945. The following objections were made by Mr. Friedman to the introduction of this evidence:

> "Mr. Friedman: I will object to it on the ground that it is a mere narrative of past events, and that neither of the offenses charged in this indictment has been established and therefore that extra judicial statements are inadmissible until the corpus delicti has been established.
>
> The Court: I will overrule the objection, and an exception may be noted.

Mr. Friedman: It will be understood that my objection is as to each count of the indictment?

The Court: Your objection goes to the introduction of the exhibit, doesn't it?

Mr. Friedman: In so far as each count is concerned; in other words, I wish my objection to appear as three objections, one to introducing it in support of the first count, the second count, and third count of the indictment.

The Court: I have never heard of that being done, but if you wish it you can have three objections and I will make three orders overruling them and three exceptions.

Mr. Friedman: Yes, because it may be admissible on one count and not admissible on the other.

The Court: All right." (Tr. pp. 166-167.)

To point the argument, hereafter presented, that the learned trial judge committed error in admitting the statement (U.S. Exhibit 18), it will be necessary to set forth the document itself and the cross-examination of the agent by counsel for the appellant Chevillard. The statement, which was admitted over objection and exception, is as follows:

"I, Fernand Chevillard, hereby make the following voluntary statement to Special Agents Ronald A. Wilson and Lee M. Fallaw of the Federal Bureau of Investigation, first having been told by them that I have the right to have an attorney, that I do not have to make any statement and that any statement I do make may be used against me in court. No threats or promises have been made to me and no inducements have been offered me. I have known Pierre Barral for about six months. He would come to the Normandie Restaurant to see me and my partner, George Patron. I knew that Pierre Barral was a chef on ships. About two or three

months ago Barral offered to sell me some meat off his ship, but I did not buy any. For the past ten days Barral has been coming to the Normandie Restaurant from his ship. About Thursday or Friday, January 18 or 19, 1945, Barral came to the Normandie Restaurant and told Patron and me that he was going to have about 15,000 pounds of meat to sell, that this meat was to be bought for the ship, 30,000 lbs. in all, but he wouldn't need it all on the trip and wanted to sell 15,000 lbs. of it before it was put on the ship. Barral offered to sell me 15,000 lbs. of New York Cuts, Filets, rib and lamb at 40c per pound. He said he wanted to sell the whole 15,000 lbs. at the same time. I told him I was broke and couldn't buy the meat, but that I would inquire around to see if I could find anyone to buy the meat and I told Barral I would also try to find a place for the meat to be stored. Every day after that Barral asked me if I had found anyone to buy the meat or if I had found a place to store it. Barral told me that he would have the meat in a truck and we had nothing to worry about except to find a place to store the meat. George Patron was present when Barral made this statement. This agreement to try to sell the meat and find a storage place for it was between Pierre Barral, George Patron and myself. We did not have an understanding about what payment was to be made to Patron and myself for finding a purchaser for this meat or for finding a storage place for it, but I expected to receive some payment from the purchaser of the meat or to profit in some way from this transaction. After having discussed the matter with Barral I made inquiries of several persons as to whether they would be interested in purchasing this meat. I also made inquiries regarding refrigerator space to store the meat. Angelo Vincenzini, a butcher who lives at 540 San Antonio Ave., Lomita Park, Calif., told me he

thought I could get storage space for the meat at Millbrae Dairy and then advised me there was storage space there which I could get. That night at the Normandie Restaurant I told Barral and Patron there was storage space available. Barral said the truck driver didn't want to come and I said 'the deal's off' because I realized the deal was wrong. Barral had told Patron and me that the meat belonged to the Merchant Marine. On Jan. 23, I was at 35 Lake St., when I got a phone call about 4:30 p.m. from Mrs. Patron, who said George Patron had told her to get in touch with me by any means possible and tell me to go to Millbrae. I then drove to Millbrae in my car and saw Mr. Jacky of the Chip Steak Co., who has the Millbrae Dairy. I told Mr. Jacky I had come for the storage space that Angelo Vincenzini had talked to him about. I then waited for the truck with the meat to arrive. I knew that George Patron would accompany the truck. Between 8:30 and 9:00 p.m., Patron came in his car to the refrigeration plant. Barral was in the truck with its driver, Lucian, whom I know by sight, when it drove up at the same time. Mr. Jacky was the only other person present. Patron, Barral and the truck driver unloaded the meat from the truck while I checked the weights of the meat with Mr. Jacky. I kept a record of the weights in my address book, notations indicating the total weight of the meat was 15,875 lbs. After the truck was unloaded Mr. Jacky asked me in whose name the receipt should be made and I told him Mr. Barral. The copy of the receipt was given to me instead of to Mr. Barral as Mr. Barral was absent changing his clothes at the time. However, the receipt would probably have been given me anyway, so I could get the meat for a purchaser if I had decided to go through with the deal, as Mr. Barral was leaving town in a short time. I paid Mr. Jacky $30 of my own money on account for storage, which

was to be at one cent a pound per month, and we agreed to settle the balance the next day. I made these arrangements with Mr. Jacky. The receipt was turned over by me to Special Agents Wilson and Fallaw on Jan. 24, 1945. I also turned over to them my notebook showing notations I made checking the meat off the truck. After the truck was unloaded I told the others that I would see them later and drove back to San Francisco alone in my car. I have not discussed the meat with anyone since that time. I got back to the Normandie Restaurant about 11:00 p.m. The hostess, Mrs. Sarah Hughes, gave me a slip of paper on which was written 'Order for 15,000—about 75' and which bore the signature of George, the chef at the Troc, a night club on Geary Blvd. I had discussed the meat with George and told him I knew where he could get meat, and I took this note to mean he would buy 15,000 lbs. of meat at 75c a lb. The price indicates to me that he wanted filets or New York cuts. I had also talked to Angelo Vincenzini and told him he could probably get some of this meat at 40c or 50c per pound. He said he might be interested in buying some of the meat later. I told Angelo Vincenzini all about the meat and where it was coming from and how it was being obtained, and he said he wanted to stay out of jail. This was on Monday, Jan. 22, 1945. During the past five or six days I mentioned this meat to several other chefs, whose names I do not know, thinking they might want to buy some of the meat.

"I have read this statement on five pages and it is true.

"FERNAND CHEVILLARD.

"Ronald A. Wilson, Special Agent, FBI—1/24/45.

"Lee M. Fallaw, Special Agent, FBI, San Francisco, California." (Tr. pp. 168-172.)

Cross-examined by Mr. Friedman as to the circumstances in which the statement was taken, the agent testified:

"The paper signed by Mr. Chevillard was written by Special Agent Fallaw. I did not write any part of it. The statement was taken on the early morning of January 24, 1945, between the hours of 2:30 and five o'clock. Mr. Chevillard was taken into custody at about 1:10 at the Normandie Restaurant and was removed from there almost immediately to the San Francisco Field Office of the Federal Bureau of Investigation, where he was kept until 5:30 in the morning. The statement was signed probably about five o'clock in the morning. I did most of the questioning of Chevillard. I spoke to him in English and had no difficulty in understanding him and he had no difficulty in understanding me. The mechanics in taking the statement were that I questioned him and then we would decide on how he wanted to say each thing and that was put into the statement. I would question him and he would answer and sometime his answer was not in a form that would go down and we would have to straighten it out —I mean we would have to ask him some questions so as to get his statement, that is his answers were not responsive at all times. We did not have a stenographer there and nobody took down the questions and answers stenographically or with a machine nor was there anything to preserve a record of what was actually said or done. Sometimes his answer would be long and rambling and sometimes it was not responsive to the question and we would have to ask the same question several times before we got a responsive answer. On other times we thought his answers was immaterial to the question that had been asked. There probably were questions that were asked and do not appear and there were answers given that do not appear in the state-

ment. He gave several explanations when we were asking about things pertaining to Barral and to the meat. It took us from about 1:30 until five a.m. to acquire the information from Mr. Chevillard that appears in this document. It took approximately 3½ hours. Mr. Chevillard did not tell us that he understood he had the right to have a lawyer. He was told that. He did not use the words that he was willing to make a free and voluntary statement. We asked him, we told him we would like to ask him some questions about this matter. He was asked if any threats or promises had been made against him or to him. We had not made any. You usually include that in the statement. I asked him if any threats or promises had been made to him and he said no, that was at the time the statement was being made. The statement was not being written during the whole 3½ hours. It was not being put on paper. We started to write the statement when we thought that Mr. Chevillard was giving us the information that was true. He did give information that I did not think was true. It consisted mostly of denials on his part. He first denied that he had any dealings with Barral outside of the fact that he had gone out to get the refrigerator space for him. He made that denial just once. He denied that he was going to profit on the sale of this meat or from this transaction. He denied that he was going to receive any of the meat. He denied that there had been any agreement between himself and Barral. In fact he denied almost every question we put to him first. He made these denials for about an hour. That is, up to somewhere around half past two. He did not deny that he knew where the meat was supposed to come from or go to. During the first hour he said that he knew it was meat that was to go to Barral's ship, and that it was going to be put on a truck and that Barral was going to get a truckload of

meat. During the first hour Mr. Chevillard said that he did not have the money to purchase the meat. He did not say that he never agreed to purchase it or never intended to purchase it. We asked him whether or not he intended to buy the meat and his reply was that he did not have the money to buy the meat, that Barral wanted to sell all the meat at one time and he did not have the money to buy it. He told us he knew Barral about six months, that Barral had first come to the Normandie Restaurant about six months previous to the time we talked to him. He said that two or three months previous Barral had approached him about selling him some meat from his ship and that he told Barral he could not use any. (Tr. pp. 172-175.)

"To a certain extent the words used in this written statement are the words used by Mr. Chevillard. I thought he spoke English quite well. He does talk a little broken, yes. This statement really is edited. It was put in a form so that it will read. It purports to be the substance and not the words of what Mr. Chevillard told me—there are some exact words there and some different. When I first questioned Chevillard about Barral first offering to sell him some meat his reply was he could not use any. If it says in the statement 'I did not buy any' then he said he did not buy any. I asked him why he did not want to buy any of the meat and Chevillard said he couldn't use any. I did not ask Mr. Chevillard if Barral had explained to him how he was going to get the meat off the ship to sell it. (Tr. pp. 175.)

Q. Let me call your attention to this particular language which appears on page 2 of the statement:

'This agreement to try to sell the meat and find a storage place for it was between Pierre Barral, George Patron, and myself.'

Q. Are those Mr. Chevillard's words?

A. I believe he agreed to that statement, in that form.

Q. Isn't it a fact that you had quite an argument with him about the word 'agreement'?

A. There was some talk about it.

Q. Well, now, what was said about it?

A. He wanted—he said he did not like the word 'agreement,' and we asked him what he would call it, and he said it was a deal. He said he did not like the word 'agreement,' and we asked him if it was not true that they had agreed to do this, and he said yes. We said, 'Isn't it true that it would be an agreement?' And he said, 'Yes,' he understood it would. (Tr. pp. 175-6.)

There was some discussion about the word 'agreement' and it was finally agreed by Mr. Chevillard that it was an agreement. I would not say we argued with him. We asked him further questions to try and determine if this was not an agreement. At first Mr. Chevillard did not want the word 'agreement' used. Afterwards we agreed that it was an agreement. I asked him if he did not think that it was an agreement and he answered that he thought it was. (Tr. p. 176.)

Mr. Friedman: Q. I will call your attention to this portion of the statement: 'About Thursday or Friday, January 18 or 19, 1945, Barral came to the Normandie Restaurant and told Patron and me that he was going to have about 15,000 lbs. of meat to sell, that this meat was to be bought for the ship, 30,000 lbs. in all, but he wouldn't need it all on the trip and wanted to sell 15,000 lbs. of it before it was put on the ship.'

Did you ask Mr. Chevillard whether or not Barral's conversations were with Chevillard and Patron together, or separately? A. Yes.

Q. What reply did he make?

A. He said he talked to both of them. They were

both there at times, and sometimes Barral talked to Patron, and sometimes to Chevillard. (Tr. pp. 176-7.)

With reference to these statements relative to conversation with Barral I do not recall which conversations took place solely between Barral and Chevillard. When I took Chevillard in custody shortly after one o'clock on the morning of the 24th I told him what he was being arrested for. I told him he was being placed under arrest in connection with a truckload of meat that was taken by Barral from the Heuck Meat Company. I don't recall if I told him anything else relative to the nature of the charge against him. I did not tell him he was being arrested for helping to steal the meat or for helping or causing to be made false statements to the War Shipping Board. I did not tell him he had been arrested because he had made or used or caused to be made, or caused to be used a trick or scheme to conceal a material fact from the War Shipping Board or the War Shipping Administration. I believe we did tell him that the charge against him would be conspiracy to defraud the government. Chevillard did not ask and we did not tell him who he was supposed to have conspired with. (Tr. p. 177.)

During this 3½ hours, while I was questioning Mr. Chevillard, there were no notes taken. I questioned Chevillard as to what he was going to get out of this transaction and he said there had been no agreement as to what he was going to get. Later he said that he expected to profit from the transaction in some manner. I asked him how, and he said he didn't know for sure whether or not from the purchaser, but in some way he expected to gain from it. There was quite a lot of discussion about that matter, probably fifteen minutes.

Q. Well, taking your figure of fifteen minutes, it is all summed up, is it not, in these words in the state-

ment as follows: 'We did not have an understanding about what payment was to be made to Patron and myself for finding a purchaser for this meat or for finding a storage place for it, but I expected to receive some payment from the purchaser of the meat or to profit in some way from this transaction.' Is that right?

A. That is the summation of what he told us.

Q. That is the summation of fifteen minutes' worth of conversation?

A. That is the summation of what I told you. I don't know how long the conversation lasted.

Q. Now, you have this statement here: 'Angelo Vincenzini, a butcher who lives at 540 San Antonia Avenue, Lomita Park, California.' He told you that he was a butcher that lived in Lomita Park?

A. I think we looked up the exact address and asked him if that was the fellow. I am quite sure that was the way it was.

Q. You looked it up where?

A. In the telephone directory.

Q. And you asked him if that was the address?

A. He had the slip of paper with the telephone number on it, and he said that was the fellow.

Q. So that he actually didn't tell you that Mr. Vincenzini lived at 540 San Antonio Avenue, Lomita Park, California, did he?

A. He said that was the Mr. Vincenzini that he had talked to.

Q. On the bottom of page 2 you have this statement: 'Barral said the truck driver didn't want to come.' Did you ask him what truck driver he was talking about?

A. No, I don't believe we did.

Q. You didn't ask if it was the truck driver of Heuck that didn't want to come?

A. No.

Q. You didn't ask if it was the truck driver that Barral had procured that didn't want to come?

A. No, sir. (Tr. pp. 177-9.)

On the top of page 3 of the statement it says, 'And I said, 'The deal's off' because I realized the deal was wrong.' Mr. Chevillard said that the deal was off and he was asked why he said that, he said that he did it because he was becoming worried about the matter and he was asked if he was worried because he knew the deal was wrong and he said 'Yes.' The reason I didn't put it in the statement is, it is not supposed to be a word for word question and answer statement, that is the substance of the conversation that took place. We discussed with Mr. Chevillard as to what should go in and what should be left out of the statement. We told him that it was his statement and that we wanted to get the facts as clear as we could in there, and before something was written down it was restated and asked if it was all right and that is the way he wished to say it. We did not discuss with Mr. Chevillard what should be left out of the statement, of the things he told me in those 3½ or 4 hours. Mr. Chevillard told me what is contained in the statement as 'Barral had told Patron and me that the meat belonged to the Merchant Marine.' I didn't tell Chevillard that he was wrong that the meat didn't belong to the Merchant Marine, but that it belonged to the War Shipping Administration.

Q. Isn't it a fact what you asked Mr. Chevillard was, 'Did you know where the meat was supposed to go?' And he told you Barral told him it was to go to the Merchant Marine?

A. No, sir, I don't think that was the way it was.

Q. You don't think—do you know?

A. Yes, sir.

Q. You have no notes?

A. I recall quite well that point, and that wasn't the way it was. (Tr. pp. 179-180.)

In reference to that portion of the statement which says that Mr. Chevillard received a phone call while at 35 Lake Street, in which Mrs. Patron told him to go to Millbrae. We had a discussion about that. Chevillard said there was nothing said as to why he should go to Millbrae, that he knew why he should go to Millbrae. I didn't put that in the statement. Chevillard did not say that he started to keep a check of the meat that was being stored at Millbrae and when he found out it had Government marks, a thing he never knew, that he stopped keeping the record. I do not recall of Chevillard saying that the reason he paid Mr. Jacky $30 was because Barral said that he had no money with him and asked Chevillard to advance the $30 for him to pay on the storage. The words in the statement, 'The receipt was turned over by me to Special Agents Wilson and Fallaw on January 24, 1945,' were not a statement made by Mr. Chevillard. It was put in the statement and he agreed to the statement after it was put in. He read the statement over and said it was true and signed it. After Chevillard signed the statement he was taken to the City Prison and booked. He was taken from the Special Field Office between 5:15 and 5:30, and brought to the City Prison around 5:30 or six o'clock in the morning. There was no further conversation. The statement was signed and I was satisfied." (Tr. pp. 180-1.)

Herbert W. Schroeder, supervising special agent for the Pacific Telephone Company, being called as witness for the Government, it was stipulated by counsel that the records of the Telephone Company showing listings of

the South City 'phone numbers 221 and 83 and San Bruno 87, were in the name of the Palace Meat Company, and that the Defendant Vincenzini had signed the cards placing the 'phone numbers; that Vincenzini was one of the owners of the Palace Meat Market; that the phone number Millbrae 727 is listed under the Chip Steak Company, of which the defendant Jacky was the manager; that Exbrook 9664 was the listing of the Normandie French Restaurant and that the listing was signed by Fernand Chevillard. (Tr. p. 182.)

Leslie W. Roberts, called by the Government, testified:

> "I am an auditor with the United States Maritime Commission which audits for the War Shipping Administration. Ships operated by the War Shipping Administration, through general agencies, all of the accounts, expense accounts, invoices and all extras, pertaining to the operation of such ships are audited by the War Shipping Administration."

The United States Attorney then offered in evidence against all the defendants the following exhibits which had been theretofore admitted against the defendant Rodriguez alone:

Exhibit 1, which is a contract between the War Shipping Administration and the United Fruit Company;

Exhibit 2, Steward's account of stores;

Exhibit 3, The order for meat from the War Shipping Administration to the Ed Heuck Company;

Exhibit 4, Memoranda showing percentage of meat cuts;

Exhibit 5, delivery tags signed by Brandt-Neilson;

Exhibit 6, memoranda by Hinman of load on truck;

Exhibits 7A, 7B and 7C being wooden box meat, carton meat and sack meat;

Exhibit 9, the tags heretofore mentioned which were signed by the defendant Rodriguez. (Tr. pp. 185, 186.)

Mr. Friedman on behalf of defendants Chevillard and Patron objected to the admission of the said exhibits upon the ground that they were acts and transactions occurring out of the presence of the said defendants and that there was no evidence connecting the said defendants with them in any manner whatsoever and that as to Exhibit 6, the list of meat given to Heuck, and Exhibit 9, the tag signed by Rodriguez, that they were no part of *res gestae* of any action of either of the defendants Patron or Chevillard. (Tr. pp. 186, 187.)

The Court admitted all of the said Exhibits in evidence, to which ruling counsel for these appellants took an exception to the ruling of the Court admitting each of the said Exhibits. (Tr. 188.)

The Government having rested its case, Mr. Friedman, on behalf of Chevillard and Patron, made a motion to strike out certain testimony and Exhibits. This motion and the several grounds thereof are set forth in Assignments of Error, 11 to 16 inclusive, and, as these Assignments are hereafter printed *in haec verba,* we shall not so set them forth at this juncture. Suffice it to say, that the chief points stated in support of the motions that the evidence in question was incompetent and hearsay and related to the acts and declarations of others out of the presence of the defendants Chevillard and Patron, and was therefore not binding upon them. A further

motion was made to strike out the statement alleged to have been taken by the F. B. I. from Chevillard on the ground that the manner in which it was procured was a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States, and on the further ground that it was a statement containing a mere narrative of past events and was not corroborated in any other portion of the record as to any of the matters or things set forth therein. The Court denied each of these motions and counsel duly excepted to each of the rulings. (Tr. pp. 189-203, Exceptions Nos. 13 to 27 inclusive.)

Mr. Friedman then moved the Court to direct the jury to return verdicts finding each of the defendants Patron and Chevillard Not Guilty on each of the three counts of the indictment upon the ground that the evidence introduced by the Government was insufficient to support a verdict of Guilty as to each defendant, and that no offense sought to be charged in each count of the indictment had been proved by the Government as against the defendant Patron or as against the defendant Chevillard. (Tr. p. 203.)

The defendants duly excepted to the denial of these motions by the Court. (Tr. p. 204.)

The Court then granted motions of counsel for the defendants Vincenzini and Jacky for directed verdicts of Not Guilty, and the trial thereafter proceeded solely against the defendants Chevillard, Patron and Rodriguez. (Tr. p. 207.)

George Halstead, recalled as a witness for the defendant Rodriguez, produced the recapitulation sheet for three

voyages of the Sea Perch. This document was an analysis of subsistence costs for each voyage. The witness testified that when he went on board the ship, he merely checked the vessel for the orderliness and cleanliness of the stores, and that he did not check the inventories or anything else. Cross-examined by Mr. Friedman, he testified:

> "Mr. Rodriguez ordered the food for the ship. He does not actually place the order with any company. The United Fruit Company picks out the supplier of that food. We place it with a firm that has been authorized by the War Shipping Administration for us to do business with. Neither myself nor the chief steward have anything to do with the quality of the meat placed on the ship. That is the Government's worry." (Tr. p. 211.)

The defendant, Julio Rodriguez, called as a witness on his own behalf, testified that he was born in Porto Rica, was 44 years old, a citizen of the United States and had been a seaman for 24 years. He had been on the Sea Perch ever since she was commissioned and his present rating was that of chief steward. His son was killed in action in France the previous September. He testified that while at sea he and the defendant Barral prepared separate inventories, Rodriguez preparing one of his own because the inventory prepared by Barral showed less meat than was in the icebox. He denied ever telling Barral that there was more meat on board than the inventory showed and that there was a chance for the two to make some money. (Tr. p. 213.)

Concerning his further dealing with Barral, he testified:

"The ship arrived in San Francisco on December 28. I left the ship December 30. I gave the inventory to Mr. Halstead on our day of arrival. He came aboard the ship. I made the rounds of the storeroom with him. I returned to San Francisco on January 13. Before I left San Francisco I did not have any discussions with Barral about anything having to do with diverting meat from the ship or selling it or anything of that character. Barral didn't report on the ship on the 29th and 30th. From the time the ship docked until I left for New York I had no talk with Barral except to tell him to take care of my department while I am away. When I came back I did not have any discussions with Barral about anything having to do with diverting meat or stealing meat or anything of that character. On January 16 I went to lunch about 2:30. Barral took me to a place to eat some fish. I don't know San Francisco and I don't know the place or the street. I do not know if he took me to the Heuck Company. He took me to a butcher shop or meat company. Barral went up to see this man and he said, 'I have 10,000 to 15,000 pounds of meat I want to sell.' This man said to him, 'Well, I don't know how I can buy this meat. Barral told him he could sell the meat some place and the man said he didn't know about that, that he supplied the ships. Barral said he knew that he was going to supply his ship and said, 'Can you make it so many thousand pounds you deduct from the meat you send, to send 15,000 pounds?' The man said he didn't know how he was going to get away with that and said he would let him know. I started to go. I did not participate in this conversation which lasted about five or six minutes. That morning I had not phoned to anybody to make an appointment to see anybody in the Heuck Company.

I did not talk to Hinman. When we got on the street I was very indignant and I said to Barral, 'What is the meaning of taking me to a place like this and talking of crookedness?' Barral said, 'Well, I want to surprise you to make some money so you can have some money.' I told Barral that I didn't need any money, that I make enough money, and I said, 'Next time you mention a thing like that I will report it to the police,' and I left and reported to the ship. Nothing else was said at that time. After that I never saw or talked to anybody from the meat company or anybody else. I never had any dealings with this meat company before in connection with ordering any meat for the ship. I never saw that man again until I see the man testify against me and I don't know if it is the same man or not."

He emphatically denies that he had any conversations or dealings with either Chevillard or Patron with reference to procuring meat:

"In the period from January 15 to 24, I went to the Normandy Restaurant very often, almost every night. I ate there. I was a regular customer there. I had been there on earlier voyages. I had dinner at the Normandy the night before I went to New York. I know Mr. Chevillard and Mr. Patron. I was introduced to him by Barral about six months ago. I never had any talk with Chevillard or Patron about getting meat off the ship. They never approached me on the question of getting meat off my ship. I never told them I could pick up meat for them. The nature of my relationship with them was just a patron in their restaurant." (Tr. p. 216.)

He further denies all knowledge of any subsequent dealings between Barral and Hinman:

> "I never gave Barral any instructions nor told him that he should have any dealings with either Heuck or Hinman of the meat company, or that he should divert the meat or that he should go to anybody about it. I did not know anything about what was going on." (Tr. p. 219.)

As to the events of January 23d, Rodriguez stated that Barral did not tell him that there was a meat truck on Sansome Street or that he had to go to San Francisco and get the truck or to make arrangements to have the truck driven to Millbrae. He further testifies:

> "I did not tell Barral to go to San Francisco to take the delivery tag over to the Heuck Company. I did not excuse him from the vessel to go any place, to do anything in connection with any meat or anything else. I did not have any conversation at all with Barral along the line of going to San Francisco to get a meat truck or take a delivery ticket or anything of that character. All of the afternoon of the 23rd I was about the ship. With respect to the uniform I wear and the rating I have, I am a lieutenant in the Maritime Service." (Tr. p. 220.)

The appellant George Patron, called on his own behalf, testified that he and Chevillard were partners in the business known as The Normandie Restaurant. About twenty-two months prior to the trial, he took a sea trip on the Monterey, on which he was the chef and Barral the steward. As they were both Frenchmen, they had considerable conversation in their own tongue. (Tr. p. 226.)

Some six months before, Barral told Patron that he expected to have some meat from a meat company. When

Barral asked if he was interested, Patron told him, "Well, you better see my partner because I don't take care of the food handling." Nothing came of this discussion.

Respecting the transactions with reference to the meat in question and his conversations with Barral in regard thereto, he testified:

> "I saw Barral in the Normandie after Christmas when he came back from sea. It was two or three weeks from January 23. He said, 'I got some meat and I make arrangements with the manager of the meat company. I hope to get that meat and I hope you fellows can buy it.' I told him I don't take care of the food handling. My duties in the Normandie were to take care of the bar and my partner took care of the food and dining room. When Barral mentioned to me this fact that he expected to have or was going to have some meat and asked me whether or not we were interested, I again referred him to my partner. The next conversation with Barral about meat was a few days before the 23rd. He got mad and said, 'What is the matter?' and I referred him to my partner. I said, 'After all, it looks pretty fishy, that meat of yours, and I don't blame my partner if he doesn't want to go along with you.' That was maybe two or three days before the 23rd. The next time I talked to Barral about meat was on the 23rd at the Normandie Restaurant, about a quarter to four or four in the afternoon. He was alone, and just he and I had the conversation. He said he had a truckload of meat and he has to move it and I said, 'What do you mean, a truckload of meat? Where did you get it?' He said, 'I fix it up with a manager of a meat company.' My partner was away then and I said to Barral, 'Why don't you wait for my partner and do whatever you want to?' Barral said he intended to get a cold storage to store it in and

I said, 'I got no time to go on stuff like that, to wait until my partner comes.' He says, 'I got to get a driver.' I say, 'I don't have no drivers here. I don't drive trucks.' So Barral went away. I thought he was gone for good. Ten or fifteen minutes later he came back with a truck driver, his first name was Lucien. Since this trial started I have learned that his last name was De Angury. This man was pretty drunk." (Tr. pp. 227, 228.)

After relating the details of the trip, the appellant Patron testifies:

"In all the conversations that I have told about or any others that I had with Mr. Barral, from the time he came back from his trip at the end of December until I got back to the Normandie Restaurant on the night of January 23, Mr. Barral never told me there was 15 or 20,000 pounds of meat on the ship that he wanted to sell. He never told me that he had any meat on the ship that he wanted to sell. He never told me that this truckload of meat he expected to get was to be meat that was to go to the ship. Barral never told me that the meat company was going to send a truckload of meat out and bill it to the ship. Barral never told me that anyone connected with the ship or with the Government was to sign any papers for this truckload of meat. Barral never told me that the meat company was going to bill the ship or the Government for this truckload of meat. The first time I realized that the meat in the truck belonged to the Government was when Chevillard popped out. That was when Chevillard said, 'You fooled me. You didn't tell me it was Government meat and it is Government meat.' " (Tr. pp. 231, 232.)

Fernand Chevillard, called on his own behalf, testified with reference to his transactions with Barral as follows:

"I know Mr. Rodriguez by sight. I saw him many times in the restaurant. He came in as a customer. I never saw him anywhere else besides at the Normandie. At all the times I saw Rodriguez he never talked to me about having any meat on the ship that could be sold. He never talked to me about my buying or his selling meat at all. Barral was first presented to me by my partner about five or six months ago at the Normandie. I know from what has been said here that sometime in September Barral went away on a ship on a trip and he came back about the end of December. Before Barral went away on that trip and sometime in September Barral spoke to me about my buying meat from him. That was not the first time I had met him. Some of Barral's friends were there. Barral says, 'Do you want to buy some meat?' I said, 'Couldn't be bothered,' the first time and went on about my business. The next day at the Normandie he says, 'Did you make up your mind?' and I said, 'No, don't bother me.' That is all that was said. I suppose the next day I said to him, 'Where do you get the meat?' and he says, 'I am fixing something with the manager of the meat company.' This was all and he went away. I said, 'Nothing doing.' I think it was after New Years that Barral again spoke to me about meat. He says, 'Are you going to do something this time?' I didn't answer. He talked to me about meat many times again—most every other day I should say. He told me the same story. He said, 'I have got a deal with the manager of the meat company.' He asked me again, 'Are you going to do something about it?' I just walked off. That happened maybe five or six times. It was always in the

course of the evening. I never stopped once to speak to him. He was following me around all the time. I mean he would talk to me about this while I was walking around my place tending to my business and he would come around and stop me. About a week before I was arrested on January 24, Barral repeated to me the same thing. He said, 'I think I am going to have some meat.' I says, 'How much?' He said, 'I don't know, maybe 10,000 or 15,000 pounds.' I said, 'Where did you get that meat?' And he said the manager of some meat company. I asked him what company and he said somewheres downtown. He asked me if I wanted to buy some of it and I said, 'No, don't bother me with that meat, you know a lot of people around here. You speak to the chefs who come around.' Once he came and said, 'Listen, I sell it to you cheap, you want it?' I said, 'What am I going to do with 15,000 pounds of meat? I have got no money.' He said he would sell it cheap 35 or 40 cents a pound, and I said, 'If you give it to me for two bits, I couldn't buy it.' He told me I didn't want to help him and I said that I was sorry. I never told Barral up to January 23 that he had asked anybody to buy some meat. On January 22, in the Normandie, about eleven o'clock at night Barral spoke to me across the partition of the bar. He asked me what I was going to do and I told him to leave me alone. I said, 'I don't want to have nothing to do with that. I have not got the money. I am too busy.' Up to this time there had been no talk as to whether the meat should be kept any place. I then went about my business. About closing time he came to me and said, 'Tell me where I can store it. A store place.' So I studied a while and said, 'All right, I will give you a place, I heard about a place in Millbrae.' He told me he didn't know that town and asked how he was going to go there.

I said I will give you the name and I will draw you something. I drew some lines and put the name 'Millbrae Dairy' there." (Tr. pp. 235-237.)

He further testifies:

"After I gave Barral this map of Millbrae, the next time I saw him was in Millbrae. I did not see Barral on the 23rd at any time before I saw him in Millbrae. Up to the time I gave Barral the map I had never asked him to get any meat for me. I had never asked him to get me meat off the ship. Barral never told me he had some meat from the ship that he wanted to sell. Barral never told me that he saved on the ship 10,000 to 15,000 or 20,000 pounds of meat that nobody knew about and that he had it for sale. Barral never told me with respect to this meat that he was going to get, that it was meat that was to go to the ship or the Government or the War Shipping Administration. Barral never told me that the way they were going to get this meat was that the truck was going to be included in a shipment which was to go to the ship or the War Shipping Administration or was to be left out. Barral never told me that somebody at the ship would sign for it. Barral never told me that the meat company was going to charge this truck load of meat to the ship or to the Government or would present a claim to the ship or to the Government for this meat. Whenever Barral mentioned meat I said, 'Is that right meat?' I never mentioned Government or anything. I said, 'Is it regular meat?' and he said, 'Yes,' and I said, 'You get it right from a wholesale house?' and he said, 'Yes.' Several times I asked him." (Tr. p. 239.)

Also:

"I never asked Barral at any time if he could get any meat for me. I never asked him at any time if he could get me any meat off the ship or Government meat. The first time that I knew that the meat that was in this truck or the meat that was in storage at Jacky's place or that the meat he said he was going to get me was Government meat was when I came to the truck after those big boxes were unloaded." (Tr. p. 243.)

With reference to the purported statement taken by the witness Johnson and Special Agent Fallaw heretofore set forth, Chevillard testified as follows:

"On January 23 I got back to the Normandie Restaurant about five minutes to eleven and was arrested about ten minutes to one. I was arrested at the door of the restaurant. I heard the bell ring and went to open the door. There were five men there and they said to me 'F.B.I.' or 'Federal Bureau of Investigation' or something like that, and they asked me if I was Mr. Patron. I told them no, that I was Mr. Chevillard. They grabbed me by the arm and put the handcuffs on and felt through my pockets. I said, 'What is it?' and they said, 'You know,' and that is all. I told the agents where Mr. Patron was. None of these agents told me what his name was. They took me to the F.B.I. headquarters where I was kept a little over four hours during which they was questioning me from every side. First two men questioned me and then there was another one, and one would go out and another would come, and sometimes there were four men and a man from outside would come inside and open a door and say, 'Are you co-operating?' and then

he would go out and the man in front of me would start again and another would put me another question and I was arguing all the time and I was kind of lost.

That is my name, Fernand Chevillard, on the bottom of each page of U. S. Exhibit No. 18, and I signed that statement. I did not know the names of the two agents who have been identified in this trial as Ronald A. Wilson and Lee M. Fallaw. When they took me to the Field Office nobody told me I had a right to have a lawyer. I asked if I could have a lawyer and they said, 'Yes,' and I said I would like to use a phone and the other agent said, 'Why don't you make a statement,' and I said that I will give him a statement. They told me I could use the phone, but did not show me where the phone was. Nobody asked me whether any promises or inducements were made to me for the purpose of making the statement. I don't recall that I stated to the agents that night that 'about two or three months ago Barral offered to sell me some meat off his ship, but I did not buy any.'

Q. The statement goes on and contains this statement: 'About Thursday or Friday, January 18th or 19th, 1945, Barral came to the Normandie Restaurant and told Patron and me that he was going to have about 15,000 pounds of meat to sell, that this meat was to be bought for the ship. 30,000 pounds in all, but he wouldn't need it all on the trip and wanted to sell 15,000 pounds of it before it was put on the ship.'

Did you tell that to the agents?

A. No, not like that, no.

Q. Did Barral ever tell you at any time that there was to be meat bought for the ship and that he wanted to sell 15,000 pounds of that meat that was

to be paid by the ship? A. No, sir.

Q. What did you tell the agents about Barral telling you anything about any meat to be sold?

A. The only thing I told the agent that he wanted to sell me some meat, but I was broke and I couldn't buy it.

Q. Did they ask you if Barral told you where the meat was coming from?

A. I don't remember.

Q. Did they ask you whether or not Barral told you it was meat for the ship?

A. I don't know.

Q. What is the answer?

A. I don't know.

Q. Now, the statement on page 2 contains this statement:

'This agreement to try to sell the meat and find a storage place for it was between Pierre Barral, George Patron and myself.'

Did you have any discussion with the agents about that?

A. I didn't want to sign because of that certain paragraph there in the statement, because I fight for the word—twenty minutes or a half hour it seemed. There was never no agreement. I never had no agreement with Barral and Patron together and I tried to point it out to them. It was wrong. So one agent would say, when you are talking about something, and suppose he says, 'Barral tells you, are you going to buy something? And you say, Oh, maybe.' He says, 'That is an agreement, isn't it?'

And another would point out something else and ask me if it is an agreement. He kept saying, 'That is an agreement.'

Q. You say that discussion went on for fifteen

or twenty or thirty minutes, at least. Tell me this: How long had they been questioning you before anybody started to write this statement?

A. Well, they wrote a few lines, about ten lines.

Mr. Hammack: I submit the answer is not responsive to the question.

Mr. Friedman: Let's hear the whole answer, maybe it is.

A. They didn't write anything for a long time.

Mr. Friedman: Q. What happened during that time when nothing was being written?

A. They were telling me all kinds of things and I was denying and I says, 'You can't tell me something I don't want to say. I can't tell you that when I didn't do it.' Then they started again.

Q. Then they would write some more, is that right?

A. That's right.

The statement was finaly finished after five o'clock in the morning.

Q. Did you read the statement?

A. No.

Q. You signed it, though? A. Yes.

Q. Why did you sign it?

A. Because I told them, 'I am all in and I don't care what you put in there.' I started to argue again about the money side. They said I was going to get something out of it. They said, 'You were going to get something. What were you going to get?' They said, 'You were going to get something.'

I said, 'All right, give me this and I will sign it.'

And that is all.

Q. That was all?

A. That was all, that's right.'' (Tr. pp. 243-247.)

In conclusion Chevillard testified on direct examination:

''I never had any discussion with Barral as to whether

he should ever get anything out of this meat transaction. I never agreed with Barral that I would pay anything for the meat. I never had any understanding or discussion with Barral whereby I would get any profit if I sold any of this meat for him." (Tr. p. 247.)

Cross-examination by the United States Attorney developed nothing inconsistent with the foregoing testimony. On re-direct examination he denied that he had stated to the F. B. I. Agents that Barral had told him that the meat belonged to the Merchant Marine. (Tr. p. 253.)

After both sides had rested, Mr. Friedman, on behalf of these appellants, moved the Court to direct the jury to return verdicts of Not Guilty as to each of them upon each count of the indictment. The Court denied each of the said motions and counsel duly excepted to the ruling.

After argument by counsel, the Court delivered its charge to the jury, to which counsel took certain exceptions which are set forth in Assignments of Error Nos. 17, 18 and 19. (Tr. pp. 63-67.)

Counsel also excepted to the refusal of the Court to give certain instructions requested by the defendants Chevillard and Patron, which exceptions are set forth in Assignments 20 to 24 inclusive. (Tr. pp. 67-73.) These assignments are hereafter printed in full in conformity with the rules of this Honorable Court.

The jury returned a verdict finding both Chevillard and Patron Not Guilty as to count 1 and Guilty as to Counts 2 and 3. (Tr. p. 27.)

Motions for a new trial and in arrest of judgment were thereafter duly made and were denied by the Trial Court, which thereupon sentenced each of the appellants

to imprisonment for two years upon each of the counts, the sentences in each case to run consecutively. (Tr. pp. 29, 30.)

From the said judgments each of said defendants on March 19, 1945, the same day as that upon which the judgments were rendered and the sentences imposed, appealed to this Court, filing separate notices of appeal. (Tr. pp. 43-46.)

The said appeals are presented on a single transcript pursuant to stipulation of counsel. (Tr. p. 308.)

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON

Assignment No. I.	(Tr. p. 52.)
Assignment No. III.	(Tr. p. 53.)
Assignment No. IV.	(Tr. p. 54.)
Assignment No. V.	(Tr. p. 54.)
Assignment No. VI.	(Tr. p. 54.)
Assignment No. VII.	(Tr. p. 55.)
Assignment No. VIII.	(Tr. p. 56.)
Assignment No. IX.	(Tr. p. 57.)
Assignment No. X.	(Tr. p. 57.)
Assignment No. XIV.	(Tr. p. 62.)
Assignment No. XVIII.	(Tr. p. 65.)
Assignment No. XX.	(Tr. p. 67.)
Assignment No. XXI.	(Tr. p. 68.)
Assignment No. XXIV.	(Tr. p. 72.)

Assignments III, IV and V all challenge the sufficiency of the evidence to justify the verdict and judgment and will be discussed under a single heading dealing with the insufficiency of the evidence.

Assignment XIV sets forth that the Court committed error in denying the motions made by counsel for these appellants at the conclusion of the Government's case to strike out the confession of appellant Chevillard.

ARGUMENT

1. THE DISTRICT COURT ERRED IN OVERRULING THE DEMURRERS TO THE INDICTMENT (Assignment of Error No. 1, Tr. 52).

> "That the above entitled court erred in its order overruling the demurrers of each of said defendants to each count of the indictment herein, to which ruling and order each of said defendants duly excepted. (Exception No. 1)"

(a) The second count of the indictment does not state facts constituting an offense.

Count Two of the indictment (Tr. pp. 3-4) charges a violation of 18 U.S.C.A. sec. 80, by alleging that all the defendants did "cover up and conceal by a trick, scheme, and devise **a material fact within the jurisdiction of the War Shipping Administration**" in the manner following: Knowing that the W.S.A. had ordered 64,793 pounds of meat from the Ed. Heuck Co., the defendants diverted and withheld 17,832 pounds thereof and did conceal such fact by "signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration, a receipt to the said Ed. Heuck Company for approximately 64,793 pounds of meat."

First, this count is **not** in the language of the statute. The statute prescribes that such offense is committed by

one who "shall * * * conceal and cover up by any trick, scheme or device a material fact * * * **in any matter within the jurisdiction** of any department or agency of the United States * * * ."

The indictment does not allege that such material fact was in a **matter** within the jurisdiction of the W.S.A.; it alleges that the **fact** was within the jurisdiction of the W.S.A.* The indictment does not allege the existence of any **matter,** by either general or special designation, to be within the jurisdiction of the W.S.A.

Thus, count two of the indictment does not charge any offense denounced by the section or any offense at all.

Secondly, no crime could be committed in the manner alleged in count two of the indictment. This count charges that the trick, etc., resorted to by defendants to conceal a material fact, was the "signing and causing to be signed, and issuing and causing to be issued **by the said War Shipping Administration, a receipt to the Ed. Heuck Company** for approximately 64,793 pounds of meat." (Tr. 4.)

Sec. 80, Title 18 U.S.C.A., is but a subparagraph of *Section 35 of the Criminal Code,* and given a separate number in the code solely for purposes of codification. All of Section 35, Criminal Code, deals mainly with frauds upon the United States and contemplates some action on the part of a person which would result in such fraud.

The count does not allege that defendants wrote and presented the receipt; or that such receipt was to be used

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*The first count of the indictment, on which appellants were acquitted, charges a fraudulent statement, etc., to have been made "in a matter within the jurisdiction" of the W.S.A. (Tr. 2.)

as a predicate for a false bill or claim against the United States. The count does not allege the doing of any act on the part of defendants whereby they prepared any false receipt or document to be presented to the W.S.A. The count does not allege that either appellant, or any defendant, was an officer, agent or employee of the W.S.A. The count does not allege that the War Shipping Administration did not receive the total amount of meat ordered, in which event the receipt would speak the truth, even though the defendants had contrived to steal 17,000 pounds of meat from the Ed. Heuck Company. The count does not allege how the issuance of a receipt by the W.S.A. could result in any defrauding of the United States.

The count charges that defendants were guilty of a crime because the W.S.A. issued a receipt to some third person.

How a receipt issued by the W.S.A. and given to the Ed. Heuck Company, thus passing out of the hands and control of the W.S.A., could conceal the fact that 17,000 pounds of meat were missing from the shipment does not appear in the charge. Inference and surmise might supply this defect, but all intendments are against the pleader and no inference or surmise can take the place of a necessary allegation in the indictment:

Pettibone v. United States, 148 U.S. 197; 37 L.Ed. 419;

United States v. Louisville, Etc., Co., 165 Fed. 936.

(b) The second count of the indictment is fatally defective because the receipt therein referred to is not set forth either according to its tenor or according to its substance.

It is an elementary rule of criminal pleading that where a written instrument is referred to in the indictment the same must be set forth according to its tenor with particularity and certainty in the absence of averments excusing the omission to set it forth, such as that it has been lost or destroyed or that it is in the possession of the accused.

A further exception sometimes arises where the indictment or information alleges that the written instrument is so voluminous that it is impracticable to set it forth in its entirety. None of these exceptions is applicable to the case at bar, where the written instruments were in the possession of the prosecution and were introduced in evidence, and where the information contains no allegation excusing the failure to set them forth.

The rule requiring the setting forth of a written instrument in *haec verba* has been applied with great strictness in the leading cases. The rule is thus stated in 27 *Am. Jur.* 647:

> "It is the general rule in the absence of statute, that an instrument referred to in an indictment must be set forth according to its tenor with particularity and certainty, or the omission to do so excused by proper averments, such as that it has been lost or destroyed or that it had remained in the possession of the accused; according to some authorities an exact copy of the writing must be set forth in the indictment."

In 42 *C.J.S.* 1055 it is said:

> "When printed or written matter enters into an offense as a part or basis thereof, it should be set forth in the indictment at least in substance, and where constituting the gist of the offense it has been held by some authorities that an instrument should be set forth in *haec verba* or according to its tenor, and that a mere statement of its effect is insufficient. Where a writing is merely incidental, or is relied on as proof of the fact charged and not in itself an offense, or where the voluminous or obscene character of the instrument, or its loss or absence, precludes its being put into the record it may be described generally without being set forth.
>
> **In the latter case the indictment should aver the reason for failure to set forth the instrument and should describe it in substance and with sufficient particularity.'"***

In a note in *Ann. Cas.* 1914B 661, it is said:

> "The word 'tenor' has been frequently considered by the Courts as to its meaning used in an indictment for crime. It has been universally held in this connection that generally an indictment 'requires **an exact copy, that the instrument set forth in the criminal pleading must be set forth in the very words and figures'.**"

In *United States v. Watson,* 17 Fed. 145, the Court, sustaining a demurrer to an indictment for conspiracy which alleged the sending of a written statement to a

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*All emphasis appearing in quotations herein, unless otherwise noted, have been supplied by the writer.

public official as one of the overt acts in furtherance of a conspiracy, says:

> "By all rules of pleading, criminal as well as civil, when a written document is relied on to sustain the prosecution or plaintiff's case, it must be set out either *verbatim* or in substance, and not a statement of the opinion of the pleader as to the effect it was intended to or might produce. The information does not undertake to give the substance of the document mentioned, but only its effect."

In *State v. Henderson,* 135 Iowa 499, 113 N. W. 328, it is said:

> "The rule is elementary that where basis of an offense is a written instrument, it should be set forth in *haec verba,* or else the substance stated."

In *Moody v. People,* 65 Colo. 339, 176 Pac. 476, the defendant was convicted of embezzlement, the information describing the paper alleged to have been stolen as "one bank check of the value of $3,800 of the personal property of Rosa Bruggebos". Reversing the conviction, the Supreme Court of Colorado says:

> "A written instrument which is the basis of larceny must be described with reasonable certainty or there should be an averment showing why a more particular description cannot be given. This rule requires that the instrument should be so set out that it may be identified and known, or there must be an averment showing good reason for not doing so, as that it has been destroyed or is in the possession of the defendant."

Almost a score of decisions are cited in support of his statement.

Tested by even the most liberal rules of pleading, the second count of the indictment is fatally defective because it gives none of the necessary data. That the failure to set forth the receipt according to its tenor was inexcusable and not within any exceptions to the general rule requiring the setting forth of such an instrument in *haec verba,* is apparent from the fact that the receipt itself which was introduced in evidence at the trial (Tr. pp. 205, 207) is brief and could have been conveniently set forth in the indictment, and was in the possession of the Government.

(c) The third count of the indictment does not state an offense.

Under the third count of the indictment defendants were charged with a conspiracy to commit offenses against the United States. (Tr. 5.) The indictment alleges that the conspiracy was to commit three separate crimes as follows: (1) to cause the Ed Heuck Co. to present a claim, false in part, to the War Shipping Administration for payment from said War Shipping Administration for a total amount of approximately 64,793 pounds of meat, each defendant well knowing that only 46,961 pounds of meat would actually be delivered to the W.S.A. by the Heuck Co.; (2) by making false statements and representations in a matter within the jurisdiction of said War Shipping Administration that approximately 64,793 pounds of meat had been received by the W.S.A. when in fact only 46,961 pounds of meat had been delivered; and (3) by resorting to a trick, scheme and device to conceal a material fact from the W.S.A. to wit: that

defendants had diverted to their own use approximately 17,832 pounds of meat from a shipment consisting of approximately 64,793 pounds of meat purchased by and intended for the use of the W.S.A., said device for concealment being that defendants caused the War Shipping Administration to sign and issue a receipt for the smaller poundage of meat.

As to the allegation that they conspired to have the Heuck Company present a false claim to the War Shipping Administration the count fails to state any offense cognizable in the Federal Courts. The statute relating to false claims (18 *U.S.C.A.* 80) relates specifically to the presentation of a claim for the **payment of money or property** by the United States. This was expressly held in the case of *United States v. Cohn,* 270 U.S. 339, 345, 70 L.ed. 616, 619.

On the very face of the indictment it is manifest that such claim was not to be filed for the purpose of procuring any meat (property) from the United States and it fails to allege that such claim was to be presented for the payment of any money. This allegation of the count not constituting an offense there could be no criminal conspiracy to do the things so enumerated.

The third allegation of this count relating to the resort to a trick or device to conceal a material fact by the War Shipping Administration issuing a receipt to the Ed Heuck Co. has been heretofore discussed under the sufficiency of the second count of the indictment. This could not constitute an offense under the very facts alleged.

Assuming that the remainder of the conspiracy charge is sufficient to show an offense denounced by statute

the query remains, is this count of the indictment valid?

It is our understanding that the Grand Jury determines for what offense a defendant shall be placed on trial. The court must proceed to determine whether the defendant has done the things charged by the Grand Jury. No court can draw the conclusion that the Grand Jury would have acted in a different manner if other facts had been presented to it. A court cannot determine that matters alleged in an indictment and which constitute a greater portion of the charge are but surplusage and can be rejected. This would be to substitute the opinion of the court for the judgment of the Grand Jury. In the instant case no one, not even a court, could determine that the Grand Jury would have returned an indictment charging a conspiracy merely to resort to the making of false representations to the War Shipping Administration. It must be assumed that the reason a Grand Jury returned the indictment was because the members believed that all of the things set forth therein constituted an offense and were material to the charge.

In *Naftzger v. United States,* 200 Fed. 494, 496, the Circuit Court of Appeals announces the applicable principle as follows:

> "Counsel for the government contend that the recital of the indictment that the stamps were stolen from 'certain post offices in the state of Kansas' is surplusage, and need not be proven, and that it sufficed if made to appear that they were stolen elsewhere from the government. We are of the opinion that, if the allegation had omitted the words quoted, it would have been sufficient; but having been alleged, the evidence must conform to and support the allegation. The return of an indictment is the work of

> the grand jury only—a co-ordinate branch of the court. It is for that body, and for no other officer, to say what shall and what shall not be charged, because the fifth amendment to the constitution declares that: 'No person shall be held to answer * * * for an infamous crime, unless on a presentment or indictment of a grand jury.' ''

In *Ex Parte Bain,* 121 U.S. 1, 9; 30 L.Ed. 849-852, the Supreme Court, commenting on the action of the trial judge in striking out four words from an indictment, stated as follows:

> "But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. * * * How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions or what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed.''

In the instant case the Grand Jury acted upon the third count of the indictment believing that two-thirds thereof constituted offenses against the United States. No one can say that a sufficient number of the Grand Jurors would have agreed to any other kind of indictment or to an indictment containing less than set forth in count three. As two-thirds of this count do not state offenses which can be the subject of a criminal conspiracy the indictment was insufficient to place defendant on trial for the charges contained therein.

2. **THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE OFFENSE SET FORTH IN COUNT TWO OF THE INDICTMENT (Assignment of Error No. 3, Tr. 53).**

"The court erred in denying the motion of each defendant for a directed verdict of not guilty upon Counts Two and Three of the indictment, which motion was made at the close of all the testimony and evidence in the case. Each of said motions on behalf of each defendant was made upon the ground that all of the evidence introduced in the case was and is insufficient to support either a verdict or judgment of guilty as to each count and that no offense sought to be charged in each count of the indictment had been proved by the evidence as against the defendant Patron or against the defendant Chevillard. The Court denied each of said motions for directed verdicts to which ruling of the court each of said defendants excepted. (Exception No. 29.)"

Assignment of Error No. 4, Tr. 54.

"That the evidence in the case was and is insufficient to establish the offense set forth in Count

Two of the indictment as against the defendant Chevillard or against the defendant Patron."

The second count of the indictment charges defendants with resorting to a trick and device to conceal a material fact from the War Shipping Administration and alleges that this was accomplished by causing the War Shipping Administration to issue a receipt for a greater poundage of meat than it actually had received from the Heuck Company.

There is absolutely no evidence to establish that either the defendants Chevillard or the defendant Patron did any such thing, or aided and abetted another in doing such thing.

Before discussing the evidence it is well to point out that the receipt (Government Exhibit No. 5, Tr. p. 205) on which this count of the indictment is based was issued and signed by the checker before the meat was transported from the place where it had been placed by the Heuck Company.

It should also be remembered that the appellants herein were not charged with stealing any meat from the Government or with stealing any meat from the Heuck Company. The evidence as a whole indicates no more than that the appellants were willing to avail themselves of the meat, but that they at all times believed the meat to be originally and finally owned by the Heuck Company up to the very moment it was conveyed in the truck to Millbrae.

We emphasize that there is no evidence to show that either Chevillard or Patron had anything to do with the issuance of any receipt or with the signing thereof

or had consented, agreed, counseled or advised that such receipt should be signed. We also emphasize the fact that there is absolutely no evidence to establish that either Chevillard or Patron had any knowledge of the following things, to wit: (a) that the Sea Perch was owned or operated by the United States; (b) that the person who was to sign the receipt, either the ships steward or the checker, was a member or employee of the War Shipping Administration or of any other governmental agency; (c) that the receipt was to be presented for signing to any person connected with the War Shipping Administration or with any other governmental agency.

Even if it be assumed—which the evidence does not establish—that appellants knew some sort of receipt was to be signed by someone, there is no evidence to establish that either appellant knew it was to be signed by anyone connected with the War Shipping Administration or any governmental agency. Neither does the evidence establish that they knew what kind of receipt was to be presented or signed or that such receipt was to be for an amount greater than the actual poundage involved in the delivery.

As these things do not appear in the evidence it should be manifest that there was a total failure of proof so far as the second count of the indictment is concerned. To establish this count the Government had to prove that the matter of the ordering and delivery of the meat was one within the jurisdiction of the War Shipping Administration; that appellants knew of this fact and so knowing intended that the receipt be issued, presented to a member of the War Shipping Administration or some authorized person connected therewith for signing and that they further knew that such receipt would be for a larger

amount than the meat actually delivered. These things were never established by the Government, save that the meat was ordered by the W.S.A. While the evidence may be construed as establishing that appellants were not loath to become parties to converting a truckload of meat belonging to the Ed Heuck Company, this would not establish the charge set forth in the second count. Appellants were not on trial for stealing any meat. The diverting or stealing of the meat is only incidental to the charge. The charge is resorting to a trick and device to conceal a material fact in a matter within the jurisdiction of the W.S.A. We have heretofore argued that such trick or device must consist of some affirmative action in the nature of a subterfuge performed by appellant and which would lead the W.S.A. along a course which would prevent knowlege of the true state of affairs. The issuance of a receipt or other document by the W.S.A. does not fall within this category. Appellants cannot be guilty of some act performed by the W.S.A. They can only be guilty of some act they performed or aided or abetted in the performance thereof. If there be such an offense the only thing appellants could have been guilty of was procuring the issuance of a receipt by the W.S.A. by fraud.

However, the evidence fails to establish that either appellant did anything relating either to the issuance of the receipt or the procurement of the signature of the checker thereto.

The substance of the entire evidence as to appellants is set forth in the abstract of the case; and it amounts to merely this: the dealings of appellants in regard to the meat were exclusively with the defendant Barral, who pleaded guilty and testified for the Government, who was

an admitted accomplice as a matter of law, and whose testimony therefore should be looked upon with great distrust and should not be the sole basis of a conviction.

Indeed, the learned trial judge instructed the Jury that the testimony of an accomplice was to be received with caution and

> "weighed and scrutinized with great care, and the jury should not rely on it unsupported, unless it produces in their minds a most positive conviction of its truth." (Tr. p. 263.)

Barral first testifies to a conversation with Chevillard and Patron sometime in September of 1943. At that conversation the appellants merely asked if the witness could get meat "from anywhere." After the witness answered in the negative, nothing further was said; and the appellants did not ask Barral if he could get meat from the ship. (Tr. p. 125.) After the return of Rodriguez from New York on January 13, 1945, Barral testifies that he went to the Normandie Restaurant and interviewed Chevillard and Patron, telling them that he **might get** some meat for them, and they answered that they were ready to take the meat at any time. (Tr. p. 127.) The only testimony of the witness tending to show knowledge on the part of either of these appellants as to how the meat was obtained is as follows:

> "I told Chevillard and Patron how I was going to get the meat, and about the delivery tags, in the Normandie restaurant on the 18th or 19th of January. I told them that **we would get the meat, 'not from the ship but from the meat company**, that we had the meat on the ship, twenty or twenty-five thousand pounds of meat, and that we got a truck that

would go to their place.' **I told them the meat would be coming from the meat company.** I said the meat was a truckload, instead of going on board the ship it would go to their place, that meat was covered by what was on board, supposed to be left over. They asked me if it was safe. I says, 'The bill will be signed by the ship's steward or the checker.' They said to let them know when we would be ready to deliver the meat." (Tr. p. 131.)

The rest of the testimony of this witness, in so far as it involves either Chevillard or Patron, deals solely with the procurement of the drunken De Angury to drive the truck, and the difficult trip to Millbrae with the meat.

On cross examination, he merely says:

"On Wednesday in the evening about 9 or 10 o'clock I spoke to Patron first at the Normandie and told him that we would talk **to the manager of the meat company,** and I told him we had thirty thousand pounds of meat they had left on board the ship and that nobody knew about it and that **we could get one truckload from the meat company and send that meat to them.** *I told Chevillard the same thing.*" (Tr. p. 140.)

Giving full faith and credit to the testimony of the accomplice, it is apparent that all that either of these appellants did was to agree to take the meat, and to accompany the truck to Millbrae, where it was placed in storage. Neither had anything to do with the issuance of the receipt or its being signed by anyone and there is no testimony that either of them entered into any agreement that such a receipt would be issued or signed. Neither of them had the power to issue the receipt, nor did they have any influence over any person whose duty it was to issue or sign it. The only testimony that they even knew

that the meat would be receipted for is the vague statement of the accomplice that he told them that the bill would be signed by the ship's steward or the checker.

Neither can the conviction be sustained on the theory that either appellant aided and abetted in the issuance or signing of the receipt or on the theory that a conspiracy existed for such purpose. Before one can be guilty as a principal in a crime he must either directly commit the act or aid, abet, conceal, command, induce or procure its commission. (18 *U.S.C.A.* 550.) Likewise, before a person may be guilty as a principal he must entertain the same criminal intent as the one who actually commits the crime. There must be a community of unlawful purpose at the time the act is committed. (22 *C.J.S.*, sec. 87, p. 155.) In the instant case there is no evidence establishing that either Chevillard or Patron aided, abetted, counselled or advised the making of any false statement to the War Shipping Administration or the concealment of any material fact from the War Shipping Administration or the resort to any trick or device, including the issuance of the receipt by the War Shipping Administration, to conceal a material fact from that agency. The sole unlawful activity of either appellant, as disclosed by the evidence, is the conversion of the truckload of meat from the Heuck Company. There is no evidence to establish that either appellant ever intended to purloin any meat from the United States or any agency thereof or to conceal such fact from any agency of the United States.

Neither can the theory of conspiracy support the convictions. While it is true that where persons conspire to commit a crime all are equally guilty for the perpetration

of an act done by a co-conspirator in furtherance of that crime, it is equally true that the scope of the conspiracy cannot be enlarged by adding the independent and voluntary acts of another conspirator. If the evidence established any conspiracy in this case, which we deny, such conspiracy could only have been to convert the meat of the Ed. Heuck Co. This was the assurance given time and again by Barral to appellants. Nowhere does he testify that he informed appellants that a receipt was to be issued by the Heuck Company and signed by a representative of the War Shipping Administration. Neither does he testify that he informed appellants any such receipt was to be for a greater amount than the poundage of meat actually to be delivered.

Barral's vague statement that he told appellants that the bill would be signed by the ship's steward or the checker, a mere voluntary statement on Barral's part (Tr. p. 131), does not make the issuance and signing of a receipt by the W.S.A. any part of the conspiracy.

A fuller discussion of the question of conspiracy will be set forth under the heading dealing with the sufficiency of the evidence as to the conspiracy count of the indictment. Suffice it here to say that neither as aiders and abettors or as co-conspirators did either of the appellants have anything to do with the issuance of a receipt by the Heuck Company or with the signing thereof by any representative of the W.S.A. It was no part of appellants' understanding, they never agreed to it, they had no knowledge of the procedure involved in the odering by and delivering of meat to the W.S.A., they did not know that either Rodriguez or the checker or Barral were members or connected with the W.S.A. In fact, appellants' sole purpose

and idea was to procure meat from the Heuck Company and not from any agency of the United States.

In regard to the appellant Patron it must be remembered that the statement of Chevillard taken by the FBI (Government's Exhibit 18), was not admitted against Patron and cannot be considered in determining the sufficiency of the evidence to support his conviction.

There is nothing in Chevillard's statement (which was procured in violation of the due process clause of the Constitution and should have been stricken out) that changes the foregoing effect of the evidence. There is nothing in this statement that has anything to do with the issuance or signing of any receipt.

Finally, there is nothing in the evidence to establish that either Chevillard or Patron knew or understood that the War Shipping Administration or the United States would lose one penny as the result of a transaction which had for its object the conversion of meat belonging to the Heuck Company.

The evidence does not establish anything other than that Barral represented to Patron and Chevillard that he had made arrangements with the meat company to get a truckload of meat and it was as to this truckload of meat that appellants directed all their activities. The evidence is fully susceptible of the conclusion that Chevillard and Patron understood that this was a private deal between the manager of the meat company and Barral whereby the manager had agreed to make available to Barral a truckload of meat.

The evidence was wholly insufficient to establish the charge set forth in the second count of the indictment.

3. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE CONSPIRACY SET FORTH IN COUNT THREE OF THE INDICTMENT (Assignment of Error No. 5, Tr. 54).

> "That the evidence introduced in the case was and is insufficient to establish the offense set forth in Count Three of the indictment as against the defendant Chevillard or against the defendant Patron."

Assignment of Error No. 3, supra.

Conspiracy is charged in the third count of the indictment (Tr. p. 5) and is alleged to have consisted in the doing of three things. We will discuss each of these matters and demonstrate that the evidence was utterly insufficient to establish this charge.

First, the count alleges that the conspiracy was for the purpose of having the Heuck Company present a false claim to the W.S.A. The evidence is silent as to any such arrangement.

Barral's testimony (Tr. pp. 123-151) contains no statement that he ever discussed with either Chevillard or Patron or Hinman, manager of the Heuck Company, anything about a false or other claim being presented to the W.S.A. or the United States.

Hinman's testimony is likewise silent as to anything being said about presenting a false claim for the payment of money to the Government. (Hinman only talked with Rodriguez and Barral—not with either appellant.) Hinman testified that on his only meeting with Barral and Rodriguez the latter stated

> "that he was willing to see that my company received receipts for the delivery of the entire order, but that up to 25,000 pounds of that order should not actually be delivered to the ship, that we were to bill the en-

tire quantity as ordered and dispose of a portion not delivered for our mutual profit." (Tr. p. 91.)

On cross-examination he stated that

"Both (Rodriguez and Barral) insisted that we would be given a receipt for the entire order." (Tr. p. 100.)

Referring to the receipts (U.S. Exhibits 5 and 9) the witness stated that "It was the **delivery tag** from which we prepare our billing against the War Shipping Administration for delivery to their agents the United Fruit Company for collection of our charges." (Tr. p. 96.)

The only talk relative to any document, between Hinman, Rodriguez and Barral, was relative to the so-called receipt or, as Hinman more correctly puts it, the delivery tag. Nothing was ever discussed about presenting any claim to the W.S.A. for payment.

Neither appellant ever entered into any arrangement with Barral or anyone else whereby it was agreed or understood that the Heuck Company should ever present for payment a claim (false in whole or in part) to the W.S.A., or that such persons agreed together to cause the Heuck Company to present such claim.

The testimony is in sad confusion as to just what claim was ever presented to the W.S.A. by the Heuck Company for payment. Appellants' counsel attempted to ascertain this fact but the trial court precluded him from so doing. Assuming, for argument, that a claim was presented and it was false in part, this does not make appellants guilty of either causing or conspiring to have such claim presented.

It is the recognized rule that where one does an act, which is not a crime against the United States at the time of its commission, such person is not criminally responsible for the subsequent criminal act or another over whom he neither had or exercised any control. Stated differently, no one is criminally liable who merely creates the means which other persons use to commit a crime. Such is the law as announced by our Federal Courts in the following cases:

United States v. Fox, 95 U.S. 670; 24 L. ed. 538;
Terry v. United States (C.C.A. 8) 131 Fed. (2d) 40;
Lowe v. United States (C.C.A. 5) 141 Fed. (2d) 1005.

The presenting of a false claim to the W.S.A. not being part of the conspiracy, even under the testimony of Barral, the independent act of the Heuck Company in presenting a false claim cannot make such action of the Heuck Company part of the conspiracy between the named defendants.

Furthermore, mere knowledge, acquiescence or approval of the act, without the co-operation or agreement to cooperate is not enough to constitute one a party to a conspiracy. There must be an intentional participation in the transaction with an intent to further the common design and purpose:

Zito v. United States, 64 Fed. (2d) 772;
Thomas v. United States, 57 Fed. (2d) 1039;
Young v. United States, 48 Fed. (2d) 26.

The second alleged means by which the conspiracy was to be furthered was by the defendants making and causing to be made false statements and representations to the

W.S.A. as to the amount of meat actually delivered. Again we reiterate the fact that there is nothing in the evidence to show that appellants knew that any statement was to be made to the War Shipping Administration or anyone connected therewith. The evidence does not establish that appellants knew that either Rodriguez or the checker were in any way connected with the W.S.A. There is no evidence to show that appellants knew that any representation of any kind was to be made to the W.S.A. or that any delivery tag or receipt was to be delivered to that agency as a representation of the amount of meat delivered, whether such tax or receipt was true or false.

All that appellants could possibly be charged with is a conspiracy to purloin meat from the Heuck Company and no more. This is the only act they participated in and did so merely on the representations of Barral that he had arranged with the meat company for a truckload of meat.

All that we have said as to the conspiracy to file false claims applies with equal force to this phase of the third count of the indictment.

Lastly, the indictment charges that the alleged conspirators were to conceal the diversion of 17,832 pounds of meat by the trick and device of having the War Shipping Administration issue a receipt to the Heuck Company for a larger amount of meat. We have discussed this phase of the matter under the sufficiency of the indictment and will not repeat such arguments here. We content ourselves with merely stating that the conspiracy, if any, of which appellants were a part, was merely to procure the truckload of meat. This meat never was the property of the United States, was never intended by the

Heuck people to be the property of the United States and was never understood by appellants to be the property of the United States. Because the Heuck people saw fit to tender a delivery tag to someone connected with the W.S.A., a matter which appellants never knew of or agreed to, cannot be made a part of the conspiracy. There has never been any allegation or contention that Hinman or the Heuck Company were parties to the conspiracy. Their acts were the acts of individuals and appellants cannot be made criminally responsible for such acts under the authorities and for the reasons hereinabove cited.

It is important to note that the receipt for the meat shipment was not executed as the result of anything done by appellants. The receipt was signed by the checker Brandt-Neilsen because he shirked his duties and did not ascertain the quantity of meat upon the pier. No one, including Rodriguez and Barral did anything to induce the checker to sign this receipt. How the parties could have conspired to bring about a result over which they have absolutely no control does not appear from the evidence.

The evidence is entirely suspectible of a construction that there were two conspiracies operating at the same time, one between Barral and Hinman, manager of the meat company, whereby Hinman was to divert meat of the company to the use of Barral, the other conspiracy being one between Barral and appellants whereby appellants were to avail themselves of the meat so converted. Whether Rodriguez was a member of either or both of these conspiracies we leave to the arguments of his own counsel.

The law is well settled that where several defendants are charged with one major conspiracy, proof of several

independent conspiracies in each of which two or more, but not all of the defendants are involved, does not establish the conspiracy charged. This doctrine has been announced by this and other Federal courts in many cases of which we cite but a few:

Terry v. United States, (C.C.A. 9) 7 Fed. (2d) 28, 30;

Tinsley v. United States, (C.C.A. 8) 4 Fed. (2d) 891;

Minner v. United States, (C.C.A. 10) 57 Fed. (2d) 506, 512;

Thomas v. United States, (C.C.A. 10) 57 Fed. (2d) 1039.

Thus, the evidence fails to establish any one of the offenses which the count charges the appellants conspired to commit.

4. **THE COURT ERRED IN REFUSING TO DIRECT THE WITNESS HINMAN TO PRODUCE THE BOOKS OF THE ED. HEUCK CO. (Assignment of Error No. 6, Tr. 54).**

"That the court erred in refusing, on motion and request of defendants, to direct Government witness, Elroy Hinman, during the course of his cross examination, to produce the books of the Ed Heuck Company, which contained a record of what was billed against the United Fruit Company, War Shipping Administration, as more fully appears as follows: The witness had testified that he was manager of the Ed Heuck Company and had supervision of the sending of the meat to the Sea Perch and that such meat was 17,000 pounds less than the amount shown in the receipt marked as Government's Exhibit 5; that the books of said company contained a record of what was billed against the United Fruit

Company, War Shipping Administration, together with the quantity and amount of deliveries that the bill represents; that such books were under his general supervision.

Mr. Friedman: Might I ask that the witness be instructed to produce the books?

The Court: I do not know that there is any reason for the granting of that.

Mr. Hammack: To which I object, as to what the books show in regard to billing; it would be improper cross examination.

The Court: Unless some more adequate reason is shown I will deny it.

Mr. Friedman: I will wind this up by stating that while this witness ordered 66,000 pounds of meat to be placed upon the various trucks and ordered 17,000 pounds, approximately, placed in one particular truck, and that this witness said as far as he knows the only amount of meat that was made up and delivered to the Sea Perch that day was the 66,000 pounds less the 17,000 pounds, that even for the purpose of testing this witness' recollection or even impeaching his testimony I have a right to see the books that are under his supervision.

The Court: I do not think there is any materiality to your point. I will sustain the objection.

Mr. Friedman: Note on exception. (Exception No. 5)."

It needs no extended argument or citation of authorities to demonstrate the error of this ruling. The books of the Heuck Company probably would have revealed the actual delivery to the Sea Perch of the entire quantity of meat called for in the order or the books would have shown the exact amount for which the War Shipping Administra-

tion was billed, thus refuting the charge that a false claim had ever been filed with the War Shipping Administration. In any event the cross-examiner had the right to test the recollection of the witness or to impeach his testimony by the books. Broad and liberal cross-examination should be permitted for the purpose of refreshing the memory of the witness or testing his recollection. (70 *Corpus Juris,* 689.)

No bill or claim of any kind was ever produced as having been presented for payment to the W.S.A.

5. **THE COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF THE WITNESS DEAN HEUCK (Assignment of Error No. 7, Tr. 55).**

"That the court erred in limiting the cross examination of the witness Dean Heuck, produced by the Government, as more fully appears as follows. The witness had testified that he was a general partner of the company that supplied the meat to the Sea Perch."

Exception No. 6

"Q. I see. Who did you bill for this meat?

Mr. Hammack: I object to that, may it please Your Honor, on the ground it is improper cross examination.

The Court: I will sustain the objection. An exception may be noted on behalf of all defendants."

Exception No. 7

"Mr. Friedman: Q. Was your company ever paid for the meat?

Mr. Hammack: Same objection, your Honor.

The Court: Same ruling, same exception."

The objection of the District Attorney to the questions set forth above was not well taken and should have been

overruled. It was proper to inquire as to whom the bill was sent and especially from a general partner in the Heuck Company. All through the case the questions were paramount as to how any concealment of a shortage had been accomplished and whether any false claim had been filed with the W.S.A. and if anyone intended or conspired to file such a claim. Appellants had the right to show that the W.S.A. was not billed for any meat in excess of the amount actually delivered. This they had the right to develop from a partner in the firm from whom the meat was ordered.

6. **THE COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF THE WITNESS BARRAL (Assignment of Error No. 8, Tr. 56).**

"The court erred in limiting the cross examination of the witness Pierre Barral, produced by the Government, which more fully appears as follows:

Q. What was it you pleaded guilty to?

Mr. Hammack: I object, your Honor. The indictment speaks for itself.

Mr. Friedman: I am trying to find out what this man thought he pleaded guilty to.

Mr. Hammack: It is not a question of what he thought he pleaded guilty.

The Court: I sustain the objection. I think that is a legal question.

Mr. Friedman: Exception, your Honor.

The Court: Exception noted."

Assignment of Error No. 9, Tr. 57.

"That the court erred in limiting the cross examination of the witness Pierre Barral, produced by the Government, as more fully appears as follows:

Q. You pleaded guilty, but you don't know how many charges you pleaded guilty to, is that right?

A. No, I don't know how many charges.

Q. Do you know how long you could be sent to jail?

Mr. Hammack: I certainly object to that as improper cross examination, immaterial, irrelevant and incompetent.

The Court: I will sustain the objection.

Mr. Friedman: Might I call the Court's attention to this?

The Court: I do not think it is necessary to argue this. You have your objection and I have ruled on it.

Mr. Friedman: May we have our exception?

The Court: Yes."

(The foregoing constitute Appellant's Exceptions 9 and 10 and will be found in the Transcript as pages 134 and 151.)

Barral had turned Government's witness after having plead guilty to the charges in the indictment. His testimony was the only evidence in the case on which the Government could base any claim that appellants were guilty. Without Barral's testimony a directed verdict of not guilty would have been inevitable. Under such circumstances the most searching cross examination was demanded and should have been accorded to appellants as a matter of right and justice. As said in the case of *Alford v. United States,* 282 U.S. 687; 75 L.ed. 624:

> "The present case, after the witness for the prosecution had testified to uncorroborated conversations with the defendant of a damaging character, was a proper one for searching cross-examination."*

*In the *Alford case* the witness was not a co-conspirator or accomplice as was Barral in the case at bar. All the reasoning of the *Alford case,* as above and hereafter set forth, applies with greater force to the instant case.

Appellants, on cross examination, had the right to impeach and discredit the witness Barral; they had the right to show that he was testifying either under the promise of immunity or leniency or **under the expectancy of receiving leniency.** That the facts justified the conclusion that Barral was testifying under some expectation or hope of leniency is made apparent when we consider that Barral had pleaded guilty (to what crimes and how many crimes he said he did not know) and was awaiting the pronouncement of judgment and sentence of the court (Tr. p. 123), and was in the custody of the U.S. Marshal. (Tr. p. 14.)

The three offenses in the indictment, to which Barral pleaded guilty, carried with them maximum, consecutive sentences of 22 years and fines totaling $30,000. The severity and length of the sentences that could be meted out to Barral were matters that the jury had the right to consider in determining his credibility.

In *Alford v. United States, supra,* the main witness for the Government was asked on cross examination where he lived. The court sustained an objection to this question. Defendant's counsel stated that he asked the question in order that the jury might know who the witness was and, further, that he had been advised that the witness was in the custody of the Federal authorities. The Supreme Court reversed the convictions solely on the ground that the action of the trial court, in cutting off such proper cross examination *in limine,* was prejudicial error requiring a new trial. Pertinent portions of the Supreme Court's opinion are as follows:

> "Cross examination of a witness is a matter of right. The Ottawa, 3 Wall. 268, 271, 18 L. ed. 165,

167. Its permissible purposes, among others, are * * * that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased (citing cases)."

The Supreme Court then points out that cross examination is necessarily exploratory and the cross-examiner need not state to the court what facts he expects to elicit. Then the court states:

"But counsel for the defense went further, and in the ensuing colloquy with the court urged, as an additional reason why the question should be allowed, not a substitute reason, as the court below assumed, that he was informed that the witness was then in court in custody of the federal authorities, and that that fact could be brought out on cross-examination to show whatever bias or prejudice the witness might have. The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise *or expectation of immunity,* or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution. *King v. United States,* 50 C. C. A. 647, 112 Fed. 988, supra; *Farkas v. United States* (C.C.A. 6th) 2 F (2d) 644, supra, and cases cited; *People v. Becker,* 210 N. Y. 274, 104 N. E. 396, supra; *State v. Ritz,* 65 Mont. 180, 211 Pac. 298, and cases cited on p. 188; *Rex v. Watson,* 32 How. St. Tr. 294. Nor is it material, as the court of appeals said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with

some other offense by the prosecuting authorities, *petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention.*"

In *Farkas v. United States,* (C.C.A. 6) 2 Fed. (2d) 644, the court deals with the right of cross-examination, under similar circumstances, as follows:

"The prosecuting witnesses, before the time of the trial, had pleaded guilty to an indictment in the federal court; the verdict of guilt or innocence in the instant case depended primarily upon their credibility as against that of defendant who testified in denial of the demands and threats. As bearing upon their credibility, motive for false accusations, as well as bias, was vitally relevant, and testimony tending to show such motive was entirely competent. Concededly promises of immunity are admissible; they are, however, rarely made. Inasmuch as the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witnesses, the relevant evidence is not alone the acts or attitude of the district attorney **but anything else that would throw light upon the prosecuting witnesses' state of mind. It is therefore entirely proper, either by cross-examination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope. The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief.**"

It became most important to discover exactly what offenses the witness Barral thought he had pleaded guilty to. The objection of the District Attorney that "The indictment speaks for itself," was not well taken. The line of inquiry did not seek to establish what offenses, as a legal proposition, the witness had in fact pleaded guilty to having committed; but **the inquiry sought to develop what offenses the witness believed he had pleaded guilty to having committed.** If his answer merely showed his belief that he had entered his plea to a minor offense, then such fact could be considered but lightly by the jury; on the other hand, if he stated that he knew his plea had been entered to the particular crimes set out in the indictment, then such fact was worthy of the deepest consideration by the jury in determining whether he was testifying under the expectation of leniency or immunity.

For like reasons the jury had the right to know and consider just what maximum sentences the witness understood could be meted out to him.

Both of the facts sought to be elicited by the cross-examination were the proper subjects of investigation and the court should have allowed the witness Barral to answer. As said in the Alford case, each appellant "was entitled to show by cross-examination that his testimony was affected by fear or favor."

7. **THE COURT ERRED IN ADMITTING THE SIGNED STATEMENT OF THE DEFENDANT CHEVILLARD (Assignment of Error No. 10, Tr. 57).**

> "The court erred in admitting in evidence, during the direct examination of Dallas A. Johnson, a witness produced by the United States, the signed statement of the defendant Fernand Chevillard, as

against the defendant Chevillard only, as more fully appears as follows:

Exception No. 11.

Mr. Hammack: At this time we will offer this statement in evidence as against Mr. Chevillard only.

Mr. Friedman: I will object to it on the ground that it is a mere narrative of past events, and that neither of the offenses charged in this indictment has been established and therefore that extra judicial statements are inadmissible until the corpus delicti has been established.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Friedman: It will be understood that my objection is as to each count of the indictment?

The Court: Your objection goes to the introduction of the exhibit, doesn't it?

Mr. Friedman: In so far as each count is concerned; in other words, I wish my objection to appear as three objections, one to introducing it in support of the first count, the second count, and third count of the indictment.

The Court: I have never heard of that being done, but if you wish it you can have three objections and I will make three orders overruling them and three exceptions.

Mr. Friedman: Yes, because it may be inadmissible on one count and (not) admissible on the other.

The Court: All right.''

(The statement of Fernand Chevillard was marked U. S. Exhibit 18.)

The statement of Chevillard (U.S. Exhibit 18) is quite lengthy and is set forth in full in the Record on pages 168 to 172 inclusive. It is also set forth in full in our statement of the case, *supra*, p. 33.

It is fundamental that the *corpus delicti* must be established by evidence other than the extrajudicial statements or confessions or admissions of a defendant,

Ryan v. United States, 99 Fed. (2d) 864;
Goff v. United States, 257 Fed. 294;

and that in the absence of independent proof of the *corpus delicti* extrajudicial statement or confession of a defendant is incompetent and inadmissible for any purpose.

Wynkoop v. United States, 22 Fed. (2d) 799;
Mangum v. United States, 289 Fed. 213;
Daeche v. United States, 250 Fed. 566;
Flower v. United States, 116 Fed. 241.

In dealing with the insufficiency of the evidence to establish the offenses set forth in counts 2 and 3 of the indictment, we have already demonstrated that the *corpus delicti* of neither one or the other of the offenses charged had been established. To avoid repetition we refer this Court back to our arguments on the insufficiency of the evidence.

As the *corpus delicti* of neither offense was established by evidence independent of Chevillard's signed statement, the court erred in admitting the same in evidence. The improper admission of this statement, damaging as it must have been to Chevillard, requires a reversal of the convictions as to him.

8. THE COURT ERRED IN REFUSING TO STRIKE OUT THE SIGNED STATEMENT OF DEFENDANT CHEVILLARD (Assignment of Error No. 14, Tr. 62).

"That the court erred in refusing to strike out Government's Exhibit No. 18, the statement signed by the defendant Chevillard, which said motion was made upon the ground that the manner in which the

statement was procured was denial of due process of law and violation of the Fifth Amendment to the Constitution of the United States, which motion was denied by the court and to which the defendant Chevillard duly noted an exception. (Exception No. 21)''

At the conclusion of the Government's case in chief, counsel for appellant Chevillard moved to strike out the statement of Fernand Chevillard taken by the F.B.I. on the following grounds, among others, to-wit:

''First, I move to strike it out on the ground that the manner in which the statement was procured was denial of due process of law and violation of the Fifth Amendment of the Constitution of the United States. Your Honor will recall that there is a series of decisions rendered in the last couple of years which deal with the taking of statements, admissions and confessions from a defendant, and without enumerating them in detail your Honor knows that they condemn the use of anything that approaches coercion, that amounts to duress in its procurement. You heard the testimony of the FBI agent who testified as to the manner in which this statement was procured * * *'' (Tr. 200.)

Thus, the trial court was fully advised that appellant Chevillard was invoking the Due Process of Law Clause of the Constitution and claiming that the statement was not free and voluntary.

The authorities are uniform to the effect that a confession of accused is inadmissible unless it is the free and voluntary act of the defendant.

The use of a confession obtained by duress or coercion is a denial of due process of law as guaranteed by the

Constitution. (*Brown v. Mississippi,* 297 U.S. 278; 80 L.ed. 682.)

The Supreme Court of the United States, on many occasions, has held that the test of whether due process has been denied in a Federal Court is not confined to a mere inquiry of whether threats had been made or violence used upon the person confessing; but rather that the true test is whether a consideration of all the surrounding circumstances, including the manner and conditions under which the accused was questioned, and the place where questioned and the length of time consumed in the questioning, resulted in depriving the accused of mental freedom. If such was the result, due process of law had been violated and the statement and confession is inadmissible for any purpose.

Ashcraft v. Tennessee, 322 U.S. 143, 154, 88 L.ed. 1192, 1199.

Also the Court has repeatedly held that in determining the validity of convictions based on confessions, the court is not confined to the due process clause:

> " . . . . the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

McNabb v. United States, 318 U. S. 332, 340; 87 L. ed. 918, 824;

United States v. Mitchell, 322 U. S. 65, 88 L. ed. 1140.

The circumstances in which the confession was taken appears in the cross-examination of Roland A. Wilson, a special agent for the FBI (Tr. pp. 172 to 181), and may be summarized as follows:

The statement was taken between the hours of 2:30 and five o'clock of the morning of January 24. Chevillard was taken into custody at about 1:10 at the Normandie Restaurant and was removed from there immediately to the San Francisco Field Office of the Federal Bureau of Investigation where he was kept until 5:30 in the morning. (Tr. p. 172.) The statement was signed about five o'clock in the morning. Wilson did most of the questioning of Chevillard. (Tr. p. 172.) "I questioned him and then we would decide on how he wanted to say each thing and that was put into the statement. I would question him and he would answer and sometime his answer was not in a form that would go down and we would have to straighten it out." (Tr. p. 173.) There was no stenographer or a machine to preserve a record of what was actually said or done. (Tr. p. 173.) Sometimes Chevillard's answers were not responsive to the question and we would have to question him several times before we got a responsive answer. At other times we thought his answers were immaterial to the questions that had been asked. (Tr. p. 173.) There were questions that were asked and do not appear. Also answers given that do not appear in the statement. He gave several explanations when we were asking him about things pertaining to Barral and to the meat. It took from about 1:30 until five a. m. to acquire the information that appears in this document. It took approximately 3½ hours. (Tr. p. 173.) Chevillard did not tell us that he un-

derstood he had the right to have a lawyer. He was told that. He did not use the words that he was willing to make a free and voluntary statement. (Tr. p. 173.) We usually include that in the statement. (Tr. p. 174.) The statement was not being written during the whole 3½ hours. We started to write the statement when we thought that Mr. Chevillard was giving us the information that was true. He would give us information that I did not think was true. It consisted mostly of denials on his part. (Tr. p. 174.) He denied that there had been any agreement between himself and Barral. (Tr. p. 174.) He made all these denials for about an hour, that is up to somewhere around half past two. "To a certain extent the words used in this written statement are the words used by Mr. Chevillard." (Tr. p. 175.) "This statement really is edited. It was put in a form so that it will read. It purports to be the substance and not the words of what Mr. Chevillard told me." (Tr. p. 175.) As to the language in the statement reading, "this agreement to try and sell the meat", etc., Mr. Chevillard agreed to that statement in that form. There was some talk about it. Chevillard said he did not like the word "agreement". There was some discussion about the word "agreement" and it was finally agreed by Mr. Chevillard that it was an agreement. We asked him questions to try and determine if this was not an agreement. At first Chevillard did not want the word "agreement" used. Afterwards we agreed that it was an agreement. When Chevillard was taken into custody I told him he was being placed under arrest in connection with a truckload of meat taken by Barral from the Heuck Company. I don't believe I told him anything else rela-

tive to the nature of the charge against him. We did not tell him who he was supposed to have conspired with. (Tr. p. 177.)

No notes were taken. Chevillard did not tell us that Vincenzini was a butcher who lived at 540 San Antonio, Lomita Park, California. We looked up the exact address in a telephone directory and asked him if that was the fellow. (Tr. p. 178.) The reason I didn't put certain things in the statement is, it is not supposed to be a word for word question and answer statement, that is the substance of the conversation that took place." (Tr. p. 179.) We did not discuss with Chevillard what should be left out of the statement of the things he told me in those 3½ or four hours. (Tr. p. 180.) The words in the statement "the receipt was turned over to me by Special Agent Wilson and Fallaw on January 24, 1945," was not a statement made by Mr. Chevillard. After Chevillard signed the statement he was taken to the City Prison and booked around 5:30 or six o'clock in the morning.

From the foregoing it is apparent that the statement not only was not a free and voluntary statement given on the part of Mr. Chevillard, but it was not even Chevillard's statement. Chevillard was arrested about 1:10 in the morning. He was not taken before a magistrate but taken to the Field Office of the FBI where he was kept for a period of about four hours. The questioning and statements of Chevillard that occurred during the first hour and a half were never included in the statement. **The only things put in the statement were those things which the FBI agent thought were true. In other words those things which the FBI agent felt would incriminate Chevillard.** Even these things were not written in the man-

ner told by Chevillard. Constant arguments occurred whereby the FBI agent or agents tried to convince Chevillard that a certain particular wording should be used in describing the events and it was only after such argument and after the repeated protests of Chevillard that the statement was signed in the form it was written. Chevillard was alone with the FBI agents. No attorney or friend was present. When the FBI agent was satisfied that he had argued and cajoled Chevillard into agreeing to the language used, **then the statement was satisfactory to the FBI agent.** Chevillard after four hours of grilling signed the statement, then and only then was Chevillard taken to jail and booked. This as the witness Wilson testified was done when "I was satisfied." (Tr. p. 181.) Even then Chevillard was not taken before a commissioner.

Under every rule and decision of the Supreme Court and of this court the foregoing facts made it the duty of the trial court to exclude the written confession.

We will not burden the court with voluminous citations from the recent decisions on this point but we do contend that the trial court should have excluded the confession and not having done so this court should reverse the judgment of Chevillard under authority of the following cases:

McNabb v. United States, supra;
Mitchell v. United States, supra;
Ashcraft v. Tennessee, supra;
Gros v. United States (C.C.A. 9) 136 Fed. (2d) 878;
Runnels v. United States, (C.C.A. 9) 138, Fed. (2d) 346.

The whole questioning of Chevillard commenced with a violation of his rights. Under the case of *McNabb v.*

United States, supra, and *Runnels v. United States,* supra, it is held that an arresting officer, including agents of the Federal Bureau of Investigation, must take the person arrested immediately before a committing officer. Such was not done in the case of Chevillard. This provision of the law requiring an arrested person to be taken before a magistrate or commissioner is to prevent the procuring of confessions in the manner resorted to in this case, and has been stated by our Supreme Court in the case of *McNabb v. United States,* supra, as follows:

> "The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard —not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible prac-

> tices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection."

In *United States v. Mitchell,* 322 U.S. 65, 64 S.Ct. 896, 88 L.ed., 1140, Justice Reed in a concurring opinion says:

> "As I understand *McNabb v. United States,* 318 U.S. 332, 87 L. ed. 819, 63 S. Ct. 608, as explained by the Court's opinion of today, the McNabb rule is that where there has been illegal detention of a prisoner, joined with other circumstances which are deemed by this Court to be contrary to proper conduct of Federal prosecutions, the confession will not be admitted. **Further, this refusal of admission is required even though the detention plus the conduct do not together amount to duress or coercion."**

In addition to the testimony of the FBI agent let us add the testimony given by appellant Chevillard as to how the statement was taken. This testimony appears in the transcript at pages 243 to 247 and is correctly summarized as follows:

> I was arrested at the door of my restaurant by five men who said to me 'FBI' or 'Federal Bureau of Investigation.' (Tr. p. 243.) They grabbed me by the arm and **put the handcuffs on** and felt through my pockets. None of these agents told me his name. They took me to the FBI headquarters where I was a little over four hours during which they were questioning me on every side. First, two men questioned me and

then there was another one, and another would go out and another one come. Sometimes there were four men and a man from outside would come inside and open a door and say, 'Are you co-operating?' Then he would go out and a man in front of me would start again and another would put me another question and, 'I was arguing all the time and I was kind of lost.' I signed the statement. I did not know the two agents who have been identified in this trial as Wilson and Fallaw. When they took me to the Field Office no one told me I had a right to have a lawyer. I asked to have a lawyer and they said yes. I said I would like to use a phone and the other agent said, 'Why don't you make a statement?' They told me I could use the phone but did not show me where the phone was. Nobody asked me whether any promises or inducements were made to me. I did not make the statement as it appears in the writing. I didn't want to sign the statement because of the paragraph that says, 'This agreement to try to sell the meat,' etc., because I fought for the word. For twenty minutes or a half hour we argued that there was never no agreement and I tried to point it out to them. It was wrong. Then the witness testified as to how the agents argued with him, that what he said he did was in fact an agreement. (Tr. p. 246.)

They didn't write anything for a long time during which they were telling me all kinds of things which I was denying. I would tell them that I couldn't tell them something when I didn't do it. I signed the statement because I told them, 'I am all in and I don't care what was put in there.' I started to argue with them about the fact that I was not going to get any money out of it. They told me I was going to get something out of it. Finally I said, 'All right, give me this and I will sign it.'

It should be noted that the Government did not cross-examine Chevillard as to the manner in which the confession was taken from him. Neither did they recall any of the FBI agents to refute Chevillard's testimony.

It may be argued that the testimony of Chevillard should not be considered in determining the error of the court in refusing to strike out this confession for the reason that Chevillard's testimony came in after the motion to strike was made. However, this court has held in *Gros v. United States,* 136 Fed. (2d) 878, that **where a conviction is based upon a confession illegally obtained, the court "in a matter so absolutely vital to defendants" will sua sponte notice and determine such fact.**

We submit that this confession was procured in a manner condemned by every decision of our Federal Courts and necessitates a reversal of the conviction of Chevillard.

10. **THE COURT ERRED IN ITS INSTRUCTIONS AS TO WHO IS AN AIDER AND ABETTOR IN THE COMMISSION OF CRIME (Assignment of Error No. 18, Tr. 65).**

That the court erred in instructing the jury as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or whoever aids, abets, counsels, induces or procures its commission, is a principal and to be prosecuted and punished as such. In other words, whoever directly does the thing that is a violation of the law is a principal, as is also one who either aids, abets, counsels, induces, or procures the doing of that act.

"The word 'aid' means to help, to support, or to assist.

"The word 'abet' means to instigate or encourage by aid or countenance, or to contribute.

"It is essential to the guilt of a person charged with aiding and abetting the commission of the crime that such person's acts shall have contributed to the effectuation of the offense. It is sufficient if it facilitated the result and rendered the accomplishment of the offense more easy.

"A person who knowingly renders assistance, cooperation, and encouragement in the commission of an offense is one who aids and abets in the commission."

Each defendant objected and noted an exception to the giving of the foregoing portion of the charge upon the ground that it did not contain the element that the person accused of aiding and abetting another in the commission of a crime, must have a criminal intent and that such act of aiding and abetting must be done with the intent of having the ultimate act actually done and accomplished. (Exception No. 31.)

The instruction as given omits the essential element of the law of vice principal, which is that:

"For one to be guilty as principal in the second degree, or an aider and abettor, it is essential that he share in the **criminal intent** of the principal in the first degree; the same criminal intent must exist in the minds of both."

26 *C. J. S.* 155, cases cited in the footnote.

"In order that a person may be convicted as an aider of a felony, he must have rendered assistance with the knowledge of the felonious intention of the principal in the crime and must have aided with such intent."

Mitchell v. Commonwealth, 225 Ky. 83, 7 S.W. 2d, 823.

In the case at bar it was of the very highest importance to these appellants that the Court in charging the jury as to the law of principals in the second degree should have given a correct charge. We have heretofore contended that there is no evidence that either Chevillard or Patron had any knowledge of the purported giving of the receipt for the full amount of the meat ordered from the Heuck Company by the United Fruit Company. No pretense was made that either of them was a principal in the first degree, and, before either of them could be held as an aider and abettor, it was necessary to prove to a moral certainty and beyond a reasonable doubt, that they shared the criminal intent of the perpetrator of the crime.

Here, the appellants never intended or contemplated that (1) any false claim should be filed with the W.S.A., or (2) that a receipt be presented to that agency for signing, or (3) that any false statement be made to that agency.

11. THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION NO. 3 (Assignment of Error No. 20, Tr. 67).

"That the court erred in refusing to give defendants' requested instruction No. 3, to which refusal each defendant duly excepted. Said instruction No. 3 reads as follows:

Requested Instruction No. 3

"Two of the defendants in this case, Pierre Barral and Lucien L. De Angury have taken the stand as witnesses in behalf of the Government. Each of these witnesses has pleaded guilty to the charges contained in the indictment. In considering the credibility to be given to each of these witnesses you have a right to take into consideration the fact that each of these men has pleaded guilty and is awaiting the pronounce-

ment of judgment. You have a right to consider these facts in determining the bias that each of these witnesses may have against their co-defendants and in determining whether or not these two men are testifying under the expectation of immunity or leniency as to the charges to which they have pleaded guilty. If you determine that either of these men are testifying in favor of the government due to any bias they may have against any other defendant in the case or under the expectation of any immunity or leniency, you have a right to consider such fact in determining the credibility of each such witness."

In discussing the obvious error of the Court's refusal to give this requested instruction, we need go no farther than to cite the cases relied upon in support of our contention that the Court committed error in curtailing the cross examination of the witness Barral. **This witness was an accomplice as a matter of law. By his own confession he was the prime mover and instigator of everything done by these appellants. He had pleaded guilty to the charge.** It was the duty of the Court to call the attention of the jury to these facts and to inform them that the criminal status of the witness, and any motive that he might have for testifying, were to be considered by them in their deliberations. It is a matter of common knowledge that criminals do not turn State's evidence without some promise or expectation of leniency or perhaps complete immunity. Chevillard and Patron had pleaded Not Guilty, thereby denying the charges against them and casting upon the Government the burden of proving every material allegation in the indictment to a moral certainty and beyond a reasonable doubt. Barral had pleaded Guilty and the presumption of his guilt was therefore conclusive.

It was the plain duty of the Court, in summing up the evidence, to direct the attention of the jury to those facts, in order that they might properly gauge the testimony of the witness.

12. THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION 37 (Assignment of Error No. 25, Tr. 72).

"That the court erred in refusing to give defendants' requested instruction No. 37, to which refusal each defendant duly excepted. Said requested instruction 37 reads as follows:

Requested Instruction No. 37

"When independent facts and circumstances are relied upon to establish by circumstantial evidence, the guilt of a defendant, each material, independent fact or circumstance in the chain of facts relied upon must each be established to a moral certainty and beyond a reasonable doubt. If in the chain in the facts of circumstantial evidence any one or more of the material facts in such chain are not established to a moral certainty and beyond a reasonable doubt, the entire proof fails and a verdict of not guilty must be returned."

This instruction was a correct statement of the law. "Where circumstantial evidence consists of a number of connected and inter-dependent facts and circumstances, it is like a chain which is no stronger than its weakest link. If any link is missing or broken, the continuity of the chain is destroyed and its strength wholly false."

Carr v. State, 28 Ala. App. 466, 187 So. 252-254;
United States v. Searcey, 26 Fed. 435;
State v. McKee, 17 Utah, 370, 53 Pac. 733.
State v. Austin, 129 N.C. 534, 40 S.E. 4;

Each essential fact must be distinctly and independently proved as if the whole issue rested upon it; to state the matter otherwise,—to a moral certainty and beyond a reasonable doubt.

State v. Dudley, 96 W. Va. 381, 123 S.E. 241;
Kassin v. United States, 87 Fed. 2d, 183.

The instruction submitted is one customarily given in all cases in which circumstantial evidence is relied upon in whole or in part and it has had the approval of the Courts ever since the leading case of *Commonwealth v. Webster,* 5 Cush. 295, 52 Am. Dec. 711.

The court gave no comparable instruction to the jury. The proof of guilt of each appellant was sought to be established by a chain of facts and occurrences. The jury should have been instructed as to the degree of proof required to establish each such fact.

13. **THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION NO. 11 (Assignment of Error No. 21, Tr. 68).**

"That the court erred in refusing to give defendants' requested instruction No. 11, to which refusal each defendant noted an exception, which requested instruction reads as follows:

Requested Instruction No. 11

'By the second count of the indictment on file herein the defendants are charged with knowingly, wilfully, unlawfully and feloniously, covering up and concealing by a trick, scheme and device a material fact within the jurisdiction of the War Shipping Administration and that the material facts so covered and concealed by such trick and scheme and device are as follows: that the defendants knew that

the War Shipping Administration had ordered from the Ed Heuck Company approximately 64,793 pounds of meat, to be delievered by the said Ed Heuck Company to the said War Shipping Administration; that possessing such knowledge that defendants diverted and withheld from said shipment approximately 17,832 pounds of said meat with the intent and for the purpose of converting the same to their own use and with the intent to defraud the said War Shipping Administration, the defendants covered up and concealed the fact of said diversion and conversion of approximately 17,832 pounds of meat by the trick, scheme and device of signing and causing to be signed and issuing and causing to be issued by the said War Shipping Administration a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

'Before you can find either the defendant Chevillard or the defendant Patron guilty on this second count of the indictment you must be satisfied from the evidence to a moral certainty and beyond a reasonable doubt that such defendant did in fact sign or caused to be signed or issue or cause to be issued by the War Shipping Administration said receipt for approximately 64,793 pounds of meat. If the evidence established that the defendant Chevillard did not sign or caused to be signed and was not instrumental in having the said War Shipping Administration issue or caused to be issued such receipt, you must return a verdict finding the defendant Chevillard not guilty. If the evidence established that the defendant Patron did not sign or caused to be signed and was not instrumental in having the said War Shipping Administration issue or caused to be issued such receipt you must return a verdict finding the defendant Patron not guilty. If you have a reason-

able doubt as to whether the defendant Chevillard or the defendant Patron signed or caused to be signed or was instrumental in having the War Shipping Administration issue or cause to be issued such receipt, you must resolve such doubt in favor of such defendant and acquit him on the second count of the indictment.' ''

The foregoing instruction would have informed the jury that they must, in order to justify a conviction on the second count, be convinced beyond a reasonable doubt that the appellants signed or caused to be signed the receipt mentioned in the indictment. Conversely it informed the jury that if there was a reasonable doubt as to whether appellants were instrumental in signing the receipt or causing it to be signed, or aided or abetted, counseled or advised its signing they must find each appellant not guilty.

Every defendant is entitled to have his theory of the case and his defense presented to the jury and to have instructions given consistent with such theory and defense:

Calderon v. United States, (C.C.A. 5) 279 Fed. 556, 558;

Hendry v. United States, (C.C.A. 6) 233 Fed. 5, 18;

Carney v. United States, (C.C.A. 8) 283 Fed. 398.

Here it was appellants' theory of defense that they had nothing to do with the receipt and did not even know that it was to be issued or signed by anyone. They were entitled to an explicit instruction on their theory of the case and defense.

No comparable instruction was given by the court. By refusing to give the foregoing instruction the court, in effect, **refused to charge that the jury must acquit appellants if they proved their innocence.**

CONCLUSION

For the failure of the indictment to charge any crime known to the law, for the utter lack of evidence to justify a conviction, and for the manifest errors committed by the trial court, it is submitted that as to each of the appellants the judgment of conviction upon each count of the indictment should be reversed and the cause remanded to the lower court with directions to dismiss the indictment and to discharge each of the appellants therefrom.

Dated: November 26, 1945.

Leo R. Friedman
Attorney for Appellants
Chevillard and Patron.